Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 01-189

In The

Supreme Court of the United States

WALTER J. THOMAS, *et al.*,

Petitioners,

v.

COLIN L. POWELL,
Secretary of the Department of State, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari

G Arthur Robbins
Counsel of Record
ATTORNEY AT LAW
116 Cathedral Street
Suite E
Annapolis, Maryland 21401
(410) 295-7100

Counsel for Petitioners

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTION PRESENTED

May the federal district court that approved settlement of a Title VII class action enjoin a subsequent state court suit by individual named representatives for the class action against their former counsel when the state court suit alleges attorney malpractice on grounds that were outside the scope of the class action fairness hearings?

LIST OF PARTIES

The parties in interest to the proceedings below were the plaintiffs- Walter Thomas, Alan B. Latimer, Mary Cynthia Smoot, Odie Fields, and Alfred Neal, and the respondents Akin, Gump, Strauss, Hauer & Feld, L.L.C., and Warren E. Connelly, individually, Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually, and Avis Buchanan, Individually.

The petitioners before this Court include Walter Thomas, Mary Cynthia Smoot, Odie Fields, and Alfred Neal.

Colin L. Powell, Secretary of the Department of State, is a named party only by virtue of being a party to the Title VII class action pled as basis for the contested injunction. The United States is not a party in interest to this Appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Anti-Injunction Act is an important limit upon the intrusion of federal courts into matters properly pending in state courts 4

II. The District of Columbia Circuit resolved issues not addressed in the prior federal litigation in order to uphold the lower court's injunction 5

a. The issues of Respondent Counsel's legal malpractice were outside the scope of the Class Action "fairness hearings" 6

b. The issue of damages in the Superior Court malpractice action is not precluded by the class action resolution 9

III. The expansion of the "relitigation exception" by the decision below raises important questions of federal law 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140, 100 L.Ed.2d. 127,
108 S.Ct. 1684 (1988) 4, 5, 9, 10

Thomas v. Akin, Gump, Strauss, Hauer
& Feld, L.L.C.,
No.99 ca1 898 (D.C. Super. Ct. 1999) 3

Thomas v. Albright,
77 F. Supp.2d 114 (D.D.C. 1999)..... 1, 3

Thomas v. Albright,
139 F.3d 227 (D.C.Cir. 1998), *cert. denied*,
525 U.S. 1033, 142 L.Ed.2d 480,
119 S.Ct. 576 (1998) ..... *passim*

Thomas v. Christopher,
169 F.R.D. 224 (D.D.C. 1996),
aff'd in part and rev'd in part..... 1, 7, 8

Thomas v. Powell,
247 F.3d 260 (D.C.Cir. 2001)..... 1, 3, 4, 6, 9

Statutes:

28 U.S.C. § 1254 1

28 U.S.C. § 2283 ..... 2, 3, 4

The petitioner Walter Thomas, *et al.* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on 27 April 2001.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at Thomas v. Powell, 247 F.3d 260 (D.C. Cir. 2001), and is reprinted in the appendix. Pet. App. 1. The opinion of the District Court for the District of Columbia is reported at Thomas v. Albright, 77 F.Supp.2d 114 (D.D.C. 1999), and is reprinted in the appendix. Pet App. 19. The opinions in the underlying Title VII class action are reported at Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), cert. denied, 525 U.S. 1033, 142 L.Ed.2d 480, 119 S.Ct. 576 (1998) and Thomas v. Christopher, 169 F.R.D.224 (D.D.C. 1996), and each is reprinted in the appendix. Pet. App. 44 and 65.

JURISDICTION

In their appeal to the Circuit Court, Petitioners challenged the jurisdiction of the District Court on the basis that the injunction at issue was a violation of the Anti-Injunction Act. The District Court's Order of Permanent Injunction was filed on 8 December 1999 and affirmed on 27 April 2001 by the Circuit Court for the District of Columbia after briefing and oral argument. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The Anti-Injunction Act –

28 U.S.C. § 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. (June 25, 1948, c. 646, 62 Stat. 968.)

STATEMENT OF THE CASE

Walter Thomas and his co-petitioners were Named Representatives in a Title VII class action suit initially filed against the State Department in 1986. The Named Representatives retained Respondent Counsel in December 1988 pursuant to a signed retainer letter. Pet. App. 133. The class action was concluded by a consent order filed by the district court on 7 November 1996 and subsequent appeal of that order decided by the District of Columbia Circuit on 27 March 1998. In March 1999, the Petitioners filed a malpractice action in the Superior Court for the District of Columbia claiming damages suffered as a direct result of Respondents' failure to comply with the terms of their engagement as individual counsel. Petitioners maintain that Respondent Counsel had, through the terms of the retainer agreement, assumed individual responsibilities to the Named Representatives that went beyond their duties to the putative class. Further, Petitioners allege that, in March of 1996, Respondent Counsel entered a "side agreement" with the Department of Justice counsel without revealing that agreement to the Named Representatives. That side agreement insured that the Respondent Counsel would remain silent in the face of the Department of Justice strategy of preventing "opt-outs" by the Named Representatives.

Petitioners further allege that the side agreement did not come to the attention of the Named Representatives until almost a year later. Complaint for Professional Negligence paragraphs 13-18, Thomas v. Akin, Gump, Strauss, Hauer & Feld, L.L.C., No.99ca1898 (D.C. Super. Ct. filed 19 March 1999) ["Complaint"] Pet. App. 116-118. When Mr. Thomas raised the issue of the failure of representation in a hearing before the district court in the Title VII action, the court stated that it was not the proper forum for resolution of the issue. Transcript of hearing 24 April 1997, pp 12-19, Pet. App. 361-365. Ultimately, the Named Representatives did not achieve the ability to opt out of the class and consequently lost the opportunity to pursue their individual damages. See Thomas v. Albright, 139 F.3d 227 (D.C.Cir. 1998), cert. denied, 525 U.S. 1033, 142 L.Ed.2d 480, 119 S.Ct. 576 (1998).

The Named Representatives subsequently sought the proper forum to address the malpractice and unrevealed conflict of interest of their retained counsel by filing suit in the Superior Court for the District of Columbia. Complaint, Pet. App. 111. Respondent Counsel sought an injunction from the district court on the grounds that the approval of the class action settlement necessarily precluded any subsequent claim based upon any failures in their performance as counsel. Petitioners opposed the injunction on the grounds that the Superior Court suit did not seek to challenge the propriety of the class action settlement and that the grounds of malpractice alleged were outside the scope of the class action fairness hearings and had not been previously addressed. The district court found that the relitigation exception to the Anti-Injunction Act (28 U.S.C. §2283) provided authority to enjoin the Superior Court suit on the basis that the adequacy of class counsel had necessarily been determined during approval of the class action settlement. Thomas v. Albright, 77 F.Supp.2d 114 (D.D.C. 1999). Petitioners appealed and a divided panel of the Circuit Court affirmed. Thomas v. Powell, 247 F.3d 260 (D.C.Cir. 2001)(Sentelle, J. dissenting).

REASONS FOR GRANTING THE WRIT

I. The Anti-Injunction Act is an important limit upon the intrusion of federal courts into matters properly pending in state courts.

The continued viable existence of a dual system of federal and state courts is dependent upon a mechanism to define and limit the circumstances under which federal courts may permissibly intervene in state court proceedings. This Court has previously explained the Anti-Injunction Act as "a necessary concomitant" to our dual court system under which "state court proceedings should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court". Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146, 100 L.Ed.2d. 127, 108 S.Ct. 1684, 1689 (1988)(internal cite omitted).

There are specific circumstances under which injunctions of state court actions by federal courts are authorized. The exceptions to the Anti-Injunction Act are enumerated in the language of the act itself: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The third exception is commonly referred to as the "relitigation exception" and is the exception at issue in this case.[1]

---

[1]The court below assumed, without deciding, that the Superior Court for the District of Columbia is a "State Court" within the meaning of the Anti-Injunction Act. Thomas v. Powell, 247 F.3d 260, 261 (D.C.Cir. 2001). Consequently, the expansiveness of the relitigation exception is the single issue presented.

This Court has previously explained that the relitigation exception was designed to permit a federal court to prevent state litigation of an issue that was presented to, and decided by, the federal court. As such, the relitigation exception can be viewed as a legislated systemic balance between the countervailing values of judicial restraint and enforced finality. Consequently, " . . . an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings have been decided by the federal court." Chick Kam Choo, supra., at 148, 108 S.Ct. at 1690. The prerequisite is "strict and narrow", based upon "the precise state of the record", it does not "not permit the District Court to render a *post hoc* judgment as to what the order was intended to say". Id.

Given the purpose of the Anti-Injunction Act, the narrow interpretation of the relitigation exception is entirely consistent and important to the orderly co-existence of the dual court system. This case is important because the court below has expanded the scope of the relitigation exception, threatening the carefully achieved historical balance of the dual-court system.

II. The District of Columbia Circuit resolved issues not addressed in the prior federal litigation in order to uphold the lower court's injunction.

Analysis of the circuit court's issue preclusion rationale supporting the injunction issued by the lower court requires a brief discussion of the malpractice claims at issue in the Superior Court. Petitioners asserted that Respondent Counsel, by the terms of their retainer agreements, had assumed duties and responsibilities to Petitioners beyond any duty or responsibilities Respondent Counsel might have had to the putative class as a whole. Petitioners further asserted a breach of those duties and alleged damages in the form of lost individual causes of action as a result of the breach.

The circuit court held that the class action fairness hearings supported an injunction precluding Petitioners from litigating the Respondent Counsel's breach of duties and that even in the event of breach, the certification of the class under Rule 23(b)(2) prevented the Petitioners from proving any damages in a malpractice action. Thomas v. Powell, supra. at 264, 265. As recognized by the dissenting opinion below, the court's analysis with respect to both issues is flawed. Id. At 266, 267. The circuit court's analysis has led to an expansive application of the relitigation exception that will encourage other federal courts to improperly intervene in state court actions.

a. The issues of Respondent Counsel's legal malpractice were outside the scope of the Class Action "fairness hearings".

Respondent Counsel first committed legal malpractice at the time they presented their engagement letters to the Named Representatives. As they argued in their brief below, it is their position that "as a matter of well-established law, Class Counsel owe[d] [the Named Representatives] no duty to act in their individual interests where those interests were contrary to the interests of the class as a whole." Respondent Counsel's Brief to the Circuit Court at 26. That explanation of duty differs significantly from their Retainer Agreement provision that seems to promise withdrawal if Counsel and Client diverge with respect to the course of the litigation:

> if the Committee and/or the Firm determine on the basis of newly discovered facts or changed circumstances that in their professional legal judgment the claim(s) in this proceeding should be dismissed, settled or otherwise disposed of, and if the Client will not consent to such settlement, dismissal or disposition, the

> Committee and/or the Firm reserve the right to withdraw from further representation in connection with this claim." See Retainer Agreement, Exhibit 1 to the Superior Court Complaint, Pet. App. 134-135.

Respondent Counsel never advised the Named Representatives that even though no class was certified, Respondent Counsel owed their highest duty to the potential of a class and not to the Named Representatives. Even when the Named Representatives voted overwhelmingly to reject the settlement being advocated by Respondent Counsel, Respondent Counsel did not withdraw from representation.

In difficult cases, it is often critical to watch for a shifting of the reference point. In both of the courts below, Respondent Counsel successfully shifted the case reference point from their failure to comply with their professional obligations under the terms of their retainer agreements to a question of the fairness of the Class Action settlement agreement, thus leading those court to agree to apply the relitigation exception to the Anti-Injunction Act.

The Petitioners brought suit against Respondent Counsel on the basis of a failure to serve in the manner retained. Complaint filed in the Superior Court, Pet. App. 111. It is true that fairness of the consent decree and adequate representation of the class as a whole were undeniably litigated and ruled upon in the district court's approval of the settlement and consent decree under Rule 23(e). In fact, the district court found the consent decree to be fair to the class as a whole; but unfair to the Named Class Representatives without adding an opt-out provision. Thomas v. Christopher, 169 F.R.D. 224, 245 (D.D.C. 1996), aff'd in part and rev'd in part, Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), cert denied, 119 S.Ct. 576 (1998). But

fairness of the consent decree to the class as a whole, or even to the Named Class Representatives within the context of the Class, is not at issue in the Superior Court malpractice suit.

The purpose of the Class Action fairness hearing is to insure that the interests of the Class as a whole have been protected. In this case, "The notice of the July 15, 1996 hearing was reasonably calculated, under all of the circumstances, to apprise interested parties of the proposed settlement and afford them an opportunity to comment on the terms of the Consent Decree." Thomas v. Christopher, supra, 169 F.R.D. at 231. The fairness hearing necessarily focused on the terms of the Consent Decree and whether Class Counsel fairly and adequately protected the interests of the class as a whole. There was no provision to explore whether Respondent Counsel had breached any individual duty to the Named Class Representatives. In fact, a review of the transcripts of Mr. Thomas's 20 March 1996 and 15 July 1996 testimony reveals a Court intent on preserving focus on the class as a whole, though clearly receptive to need for opt-outs. Pet. App.169-173 and 360-366. By the time of the 20 March 1996 hearing, the damage born of the Respondent Counsel malpractice was complete; the critical framework of the settlement agreement precluded opt-outs because it did not establish the hybrid nature of the action or the substantially different nature and magnitude of the financial claims of the Named Class Representatives.

The critical failures of Respondent Counsel as personal counsel to the Named Class Representatives occurred long before the consent agreement was reached. In a long and complicated negotiation process, the earlier the Named Class Representatives learned that they needed separate counsel to protect them from Respondent Counsel, the better the opportunity that separate individual counsel could have had impact on the course of the litigation. Had Respondent Counsel timely informed the Named Class Representatives of the conflict, or withdrawn pursuant to the

retainer agreements, the Named Class Representatives would have earlier engaged independent counsel to protect their personal interests. Those failures to inform and failures to withdraw when under conflict are the issues in the Superior Court malpractice suit and they were nowhere addressed in the Class Action fairness hearing.[2] Consequently, the circuit court's holding that the relitigation exception permits an injunction barring resolution of the breach claims in the Superior Court represents an expansive view of issue preclusion and a departure from this Court's precedent requiring the court to look to what the earlier federal order actually said. Chick Kam Choo, supra., 486 U.S. at 148, 108 S.Ct. at 1690.

b. The issue of damages in the Superior Court malpractice action is not precluded by the class action resolution.

As recognized by the dissent below, Thomas v. Powell, supra., at 266, Petitioners are not estopped from proving damages merely on the basis that the certification of class action as a Rule 23(b)(2) class did not permit opt outs. Again, the court below did not limit its decisional basis to

---

[2]Nor would one expect that counsel's breach of duties to individual clients should be a part of the fairness hearings – by definition, fairness hearings concern the best interests of the class. A malpractice action is the most natural venue to address counsel's breaches of individual engagement agreements with individuals who are also class members. The potential for malpractice action following case resolution should provide no further concern to potential class counsel than it does for any other lawyer. It should, however, provide impetus for drafting retainer agreements that make clear putative class counsel's primary duty to the putative class and distinctly subservient obligation to the retainer signing Named Representatives. That, in conjunction with fair and adequate counsel during the engagement process, would make clear to potential Named Representatives that they are merely the class action vehicle and neither the driver(s) nor primary passenger(s).

"what the earlier federal order said." Chick Kam Choo, 486 U.S. 148, 108 S.Ct. 1690. Rather the court extrapolated an earlier federal finding based upon a lack of record presented, see Thomas v. Albright, 139 F.3d 227, 235-237 (D.C.Cir. 1998), to conclude that Petitioners would be unable to demonstrate damages. In this way, the court claimed an issue preclusion bar, preventing Petitioners from proving their state claim (which, to succeed, necessarily would include adequate evidence to show that a Rule 23(b)(3) class could have been certified.) As the dissent recognized, the question of whether the class action could have been certified in a different form, under circumstances other than those presented to the court at the time of certification, does not impugn the prior federal holdings in any way. It is simply another issue not previously litigated. The damage preclusion basis for the circuit court's opinion required resolution of issues not litigated and represents an expansion of the relitigation exception to the Anti-Injunction Act.

III. The expansion of the "relitigation exception" by the decision below raises important questions of federal law.

In Chick Kam Choo v. Exxon Corp., this Court emphasized that application of the relitigation exception to permit a federal injunction of a state court action requires the district court to assess "the precise state of the record and what the earlier federal order *actually* said; it [does] not permit the district court to render a *post hoc* judgment as to what the order was *intended* to say." 486 U.S. 148, 108 S.Ct. 1690 (emphasis from original). The decision below has now expanded the relitigation exception to enable an injunction to bar state court resolution of issues never addressed in the prior federal action merely on the basis that the plaintiffs are not likely to succeed in the state court.

The expansion of the federal judiciary's willingness to intervene in state court matters raises important questions with respect to the impact of this more activist federal approach upon the dual court system. Congress and this Court have historically regarded restraint of the federal court system as an important component to the viability of the dual system. The decision below undermines that component.

CONCLUSION

The injunction issued by the district court in this case is an invasion upon the jurisdiction of the Superior Court for the District of Columbia and violates the dictates of the Anti-Injunction Act. The circuit court's affirmance of the injunction required more expansive application of the relitigation exception to the Anti-Injunction Act than has previously been approved by this Court. Consequently, a conflict in an important question of federal law on judicial restraint has been created by the decision below. The Court should grant this petition for certiorari to resolve the conflict.
Respectfully submitted,

Dated: July 26, 2001

By:
G Arthur Robbins
Counsel of Record
G Arthur Robbins, LLC
116 Cathedral Street
Suite E
Annapolis, Maryland 21401
(410) 295 7100
GarRobbins@Earthlink.net

Counsel for Petitioners

Supreme Court, U.S.
FILED

No. 01-189 JUL 26 2001

In The OFFICE OF THE CLERK

Supreme Court of the United States

WALTER J. THOMAS, *et al.*,

Petitioners,

v.

COLIN L. POWELL,
Secretary of the Department of State, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appendix to Petition for Writ of Certiorari

G Arthur Robbins
Counsel of Record
ATTORNEY AT LAW
116 Cathedral Street
Suite E
Annapolis, Maryland 21401
(410) 295-7100

Counsel for Petitioners

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

312 pp

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion
United States Court of Appeals
for the District of Columbia Circuit
Record No. 00-5022
entered April 27, 2001 ..... App. 1

Opinion
United States District Court
for the District of Columbia Circuit
Case No. 86-2850 (SS)
entered December 8, 1999 ..... App. 19

Order
United States District Court
for the District of Columbia Circuit
Case No. 86-2850 (SS)
entered December 8, 1999 ..... App. 43

Opinion
United States Court of Appeals
for the District of Columbia Circuit
Record Nos. 97-5004(L), 97-5018
entered March 27, 1998 ..... App. 44

Opinion
United States District Court
for the District of Columbia Circuit
Case No. 86-2850 (SS)
entered November 7, 1996 ..... App. 65

Order
United States District Court
for the District of Columbia Circuit
Case No. 86-2850 (SS)
entered November 7, 1996 ..... App. 109

Complaint
Superior Court of the District of Columbia
Civil Division
Case No. 99ca1898
filed March 19, 1999 ..... App. 111

Retainer Agreement by and between
Washington Lawyers' Committee for Civil Rights and
Akin, Gump, Strauss, Hauer & Feld and
Walter J. Thomas
dated December 1988 ..... App. 133

Transcript of Hearing Proceedings before
The Honorable Stanley Sporkin
on March 20, 1996 ..... App. 136

Excerpts of Transcript of Hearing Proceedings before
The Honorable Stanley Sporkin
on July 15, 1996 ..... App. 179

Testimony of Alan Latimer:

Direct Examination ..... App. 225
Cross Examination ..... App. 241

Testimony of Bruce Thomas:

Direct Examination ..... App. 243

Transcript of Hearing Proceedings before
The Honorable Stanley Sporkin
on July 15, 1996, continued:

Testimony of Odie Fields:

Direct Examination ..... App. 255

Testimony of Ray Robinson:

Direct Examination ..... App. 261

Testimony of Mary Smoot:

Direct Examination ..... App. 268
Cross Examination ..... App. 273

Testimony of Dorothy Watson:

Direct Examination ..... App. 274

Testimony of Alfred Neal, Jr.:

Direct Examination ..... App. 280
Cross Examination ..... App. 284

Testimony of Bisa Williams-Manigault:

Direct Examination ..... App. 285

Testimony of Odie Fields, recalled:

Direct Examination ..... App. 289

Testimony of Charlotte Williams:

Direct Examination ..... App. 296

Transcript of Hearing Proceedings before
The Honorable Stanley Sporkin
on July 15, 1996, continued:

Testimony of Bernard Johns:

Direct Examination ..... App. 299

Testimony of Lisa Ruth Layne:

Direct Examination ..... App. 302

Testimony of Edith Spruill:

Direct Examination ..... App. 305

Testimony of Robert Watkins, Jr.:

Direct Examination ..... App. 309

Testimony of Earle Scarlett:

Direct Examination ..... App. 311

Testimony of Walter Thomas:

Direct Examination ..... App. 326

Transcript of Hearing Proceedings before
The Honorable Stanley Sporkin
on April 24, 1997 ..... App. 353

28 U.S.C. §2283 ..... App. 367

I of 6 DOCUMENTS

WALTER J. THOMAS, ET AL., APPELLANTS v. COLIN L. POWELL, SECRETARY OF THE DEPARTMENT OF STATE, ET. AL., APPELLEES

No. 00-5022

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

247 F.3d 260, 2001 U.S. App. LEXIS 7687

January 18,2001, Argued
April 27, 2001, Decided
April 27, 2001, Filed

PRIOR HISTORY:

[**1] Appeal from the United States District Court for the District of Columbia. (86cvO2850).

DISPOSITION:

Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE:

Plaintiffs took part in a federal class action, which settled. Afterward, plaintiffs sued defendant class counsel in state court for professional negligence. On defendant's motion, the United States District Court for the District of Columbia enjoined plaintiffs from pursuing their state court suit. Plaintiffs appealed.

OVERVIEW:

Plaintiffs cited the Anti-Injunction Act as the reason why the district court erred in issuing an injunction barring them from prosecuting their state court lawsuit. In that lawsuit, plaintiffs claimed that defendant breached duties owed to them with respect to the class settlement. Plaintiffs also claimed their retainer agreement imposed additional duties on defendant. The Anti-Injunction Aces relitigation exception clearly applied to the settlement-related claims since the district court, in approving the settlement, found it was fair, adequate, and reasonable, and was not the product of collusion between the parties. Further, the district court found that defendant fairly and adequately protected the interests of the class. The remaining retainer-related claim also entailed relitigating an issue already decided in the federal courts. Accordingly, plaintiffs were barred from pursuing their state court complaint.

OUTCOME:

The judgment was affirmed.

CORE CONCEPTS

Civil Procedure: State & Federal Interrelationships Anti-Injunction Act

The Anti-Injunction Act forbids federal courts from granting injunctions to stay proceedings in a state court, with three exceptions. *28 US.C.S. § 2283.*

Civil Procedure: State & Federal Interrelationships Anti-Injunction Act

One of the exceptions to the Anti-Injunction Act permits a federal court to enjoin state proceedings when necessary to protect or effectuate its judgments. *28 US.CS. § 2283.*

Civil Procedure: Preclusion & Effect of Judgments
Collateral Estoppel

The doctrine of collateral estoppel, or as it is now commonly called "issue preclusion," provides that once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Civil Procedure: State & Federal Interrelationships Anti-Injunction Act

The relitigation exception to the Anti-Injunction Act permits federal courts to enjoin state court adjudication of claims or issues that actually have been decided by the federal court.

Civil Procedure: Settlements: Settlement Agreements

Before approving a class action settlement, the district court must determine whether the settlement is fair, adequate, and reasonable and is not the product of collusion between the parties.

Torts: Malpractice Liability: Attorneys

In the District of Columbia, a legal malpractice plaintiff is required to demonstrate duty, breach, causation, and harm. As with any tort action, legal malpractice liability is predicated on a finding that the injury was proximately caused by the breach of duty.

Civil Procedure: Class Actions: Prerequisites

If an opt out right cannot be justified, there is no reason to certify a class action under Fed. R. Civ. P. 23(b)(3) rather than Fed. R. Civ. P. 23(b)(1) or (2).

COUNSEL:

G. Arthur Robbins argued the cause for appellants. On the briefs was David G. Whitworth, Jr.

Henry F. Schuelke, III argued the cause for appellees. With him on the brief were. S. Robert Sutton, Henry Morris, Jr., and Marc L. Fleischaker.

JUDGES:

Before: EDWARDS, Chief Judge, SENTELLE and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge RANDOLPH. Dissenting opinion filed by Circuit Judge SENTELLE.

OPINION BY:

RANDOLPH

OPINION;

[*261]

RANDOLPH, *Circuit Judge:* The Anti-Injunction Act forbids federal courts from granting injunctions "to stay proceedings in a State court," with three exceptions. *28 US.C § 2283.* One of the exceptions permits a federal court to enjoin state proceedings when "necessary ... to protect or effectuate its judgments." *28 US.C. § 2283.* The scope of this "relitigation exception" is the central issue in this case.

Walter J. Thomas cites the Anti-Injunction Act as the reason why the district court erred in issuing an injunction barring him and his co-plaintiffs from prosecuting a lawsuit in the Superior [**2] Court for the District of Columbia. We shall assume, without deciding, that the District of Columbia is a "State" within § 2283's meaning. A lawsuit Thomas and others brought in the Superior Court complains about the performance of their attorneys in a class action filed in the United States District Court for the District of Columbia in 1986. Much of the history is recounted in *Thomas v. Albright, 139 F. 3d 22 7 (D. C. Cir. 1998).* The federal

action began when Thomas and another plaintiff filed a complaint in district court seeking certification as a class action and alleging that the Department of State discriminated against black Foreign Service Officers. *See id. at 229.* After six years of discovery, an amended complaint allowing 30 additional individuals to intervene, the addition of still more class representatives and lengthy settlement negotiations, attorneys [*262] for parties signed a consent decree resolving the case and agreeing that the district court should certify the class and approve the settlement pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. *See Thomas, 139 F.3d at 229.* By this point, however, the relationship [**3] between class counsel and Thomas and several other class representatives had frayed.

At a hearing on January 31, 1996, Thomas complained at length that several of the named class action plaintiffs had neither been informed of, nor agreed with the impending settlement. One month earlier, in December 1995, Thomas had retained another attorney-Barbara B. Hutchinson--to represent his interests. On March 20, 1990 me district cowl held a preliminary fairness hearing. The new attorney representing Thomas and Allen Latimer (a co-plaintiff in the Superior Court action) argued that because her clients disagreed with parts of the proposed settlement, the court could and should modify it. An attorney representing Odie Fields, Mary Cynthia Smoot, and Alfred Neal (the remaining coplaintiffs in the Superior Court action) argued against the consent decree and urged the district court to reject it. Thomas personally asked the court not to give preliminary approval to the proposed settlement. Despite Thomas's plea, me court tentatively approved the settlement and ordered notice to be given to the 359 putative class members, of which 34 wrote to me cowl supporting the settlement, while 55 wrote [**4] in opposition to it. *See Thomas, 139 F.3d at 230.* On July 15 and 23, 1996, the court held an additional fairness hearing. Attorneys for Thomas and other class members again urged the court to modify or to reject the settlement.

In its final judgment, the district court concluded that the settlement was fair and reasonable, but the court added a provision permitting nine class members to opt out of the settlement. *See id.* On appeal, we held that the district court had abused in discretion in allowed these class members to opt out. We also concluded that the overall class settlement was fair. *See id. at 233.* Five of the class members then sued the class counsel for professional negligence in the Superior Court of the District of Columbia. On a motion by the class counsel defendants, the district court enjoined these class members from pursuing their suit. *See Thomas v. Albright, 77F Supp. 2d 114,124 (D.D.C. 1999).*

Thomas and his co-plaintiffs think the Anti Injunction Act barred the injunction and that the relitigation exception does not apply. The exception rests on the idea that federal courts should not be forced to rely ["5] on sot court application of *resjudicata or* estoppel principles to protect federal court judgments and decrees. *See Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147, 100 L. Ed. 2d 127, 108 S. Ct. 1684 (1988); Toucey v. New York Life Ins. Co., 314 U.S. 118o 146, 86 L. Ed. 100, 62 S. Ct. 139 (1941)* (Reed, J., dissenting). Although the attorney-defendants in the Superior Court action case were not parties to the concluded federal action, traditional preclusion principles may nonetheless bar Thomas and his coplaintiffs from prosecuting that action against them. *See Parklane Hosiery Co. v. Shore, 439 US. 322, 326 n.5, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979); Ethnic Employees of the Library of Congress v. Boorstin, 243 U.S. App. D.C. 186, 751 F.2d 1405, 1409 (D.C. Cir. 1985);* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1980). The doctrine of collateral estoppel, or as it is now commonly called "issue preclusion," see *RESTATEMENT, supra, at* 1, provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a [**6] [*263] different cause of

action involving a party to the prior litigation." *Montana v. United States, 440 US. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979); see McLaughlin v. Bradlee, 256 US. App. D.C. 119, 803 F2d 1197, 1201-02 & n. 1 (D.C. Cir. 1986); Otherson v. Department of Justice, 228 US. App. D.C. 481, 711 F.2d 267, 273 (D.C. Cir. 1983).* The relitigation exception to the AntiInjunction Act therefore permits federal courts to enjoin state court adjudication of those "claims or issues ... [that] ... actually have been decided by the federal court." *Chick Kam Choo v. Exxon Corp., 486 US. at 148.*

Even if a federal court had not decided all the issues raised in the state court action, the relitigation exception could still apply. Assume, for instance, that issues not decided in the federal action would be resolved in plaintiffs favor in the state court. If the plaintiff still could not prevail because an essential element of his state cause of action had already been determined against him in the federal suit, the relitigation exception would permit an injunction against the state proceedings. See, *e.g.* [**7] , *Next Level Communications v. DSC Communications Corp., 179 F3d 244, 256-57 (5th Cir.* 1999) (enjoining entire state court action where state court would be required to decide issues already litigated in federal court); *see also United States v. District of Columbia, 210 US. App. D.C. 87, 654 F.2d 802, 809-10 (D.C. Cir. 1981)* (finding that relitigation exception permits federal courts to enjoin state proceedings that raise a different cause of action, but still threaten judgment in federal proceeding). In this case, we must therefore compare the complaint in the Superior Court to the record in the class action in order to determine whether, in order for the plaintiff to succeed in Superior Court, that court will have to rule upon an issue or claim already decided by the federal district court or the court of appeals. *See Chick Kam Choo, 486 US.. at 148.*

In their Superior Court complaint, Thomas and his coplaintiffs alleged the following:

1. The class action attorneys breached a duty of undivided loyalty to Thomas by " 'selling out' and betraying [the Plaintiffs] ... when they entered into (a) secret agreement" to settle the case [**8] without seeking Thomas's approval first. See Complaint for Professional Negligence P 28, *Thomas v. Akin, Gump, Strauss, Hauer & Feld, L.L.C.*, No. 99cal898 (D.C. Super. Ct. filed Mar. 19, 1999); *see also id.* P P 37, 46, 55, 64 (making same allegations for Thomas's coplaintiffs).
2. The class action attorneys failed to disclose the alleged conflict of interest created by acting as class counsel and failed to inform Thomas of the negotiating position they would take with the State Department. See *id.* P 29; *see also id.* P P 38, 47, 56, 65 (making same allegations for Thomas's co-plaintiffs).
3. The class action attorneys failed to follow Thomas's "express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for him to 'opt-out' of the class in order to receive his full measure of damages..... *Id.* P 26; *see also id.* P P 35, 44, 53, 62 (making same allegation for Thomas's co-plaintiffs).

Thomas and his co-plaintiffs claimed that because of these alleged breaches of duty, they lost their federal cause of action and the potential damages they might have derived from it. *See id.* P 31; *see also id.* [**9] P P 40, 49, 58, 66 (making same allegations for Thomas's coplaintiffs). They also alleged that they suffered damages by having to retain separate counsel and spend additional time and money dealing with the [*264] federal lawsuit. *See id.* P P 30,39, 482 57, 65.

As to the first two of these claims there can be no doubt that the district court's injunction falls within the exception to the Anti-Injunction Act. Before approving the class action settlement, the district court performed its duty of determining whether the "settlement is fair, adequate, and reasonable and is not the product of collusion between the parties." *Pigford v. Glickman, 340 US. App. D.C. 420, 206 F.3d 1212, 1215 (D.C* Cir 2000) (internal quotations omitted). The court found that the "settlement was clearly negotiated at arras length and presents no danger of collusion" between the parties. *See Thomas v. Christopher, 169 F.R.D. 224, 239 (D.D.C. 1996).* The court further found that class counsel "fairly and adequately protected the interests of the class." *Id.* While the Superior Court complaint alleges that the class action attorneys "sold out" their clients, that they engaged [**10] in collusive secret negotiations to the detriment of their clients, the district court squarely decided otherwise. The Superior Court plaintiffs may not relitigate these matters and an injunction preventing them from doing so in the Superior Court was in order.

The third claim set forth above rests partly on the retainer agreement between Thomas and the class action attorneys, an agreement Thomas says imposed additional duties on the class action attorneys. nI Thomas's complaint pointed to this language in the agreement:

In the event there is any offer of settlement that would compromise and resolve all the plaintiffs' claims in *Walter J Thomas v. Shultz,* C.A. No. 86-2850, the Client hereby agrees to abide by the wishes of the majority of the plaintiffs with respect to the acceptance or rejection of Be settlement offer.

Compl. P 9.

nl Though the Superior Court complaint does not make this distinction, the retainer agreement is between the class action attorneys and Thomas alone.

His claim[**11] regarding their retainer agreement is part of a larger argument about whether the class action attorneys committed professional negligence. In the District of Columbia, a legal malpractice plaintiff is required to demonstrate duty, breach, causation, and harm. "As with any tort action, legal malpractice liability is predicated on a finding that the injury was proximately caused by the breach of duty." *Dalo v. Kivitz, 596 A.2d 35, 41 (D.C. 1991).* For the sake of argument we shall assume that Thomas (and his co-plaintiffs) would be able to make his case in the Superior Court that the class action attorneys had a duty and breached it. Thomas would still have to prove that he suffered a harm as a result. According to the complaint, his harm or injury consisted in his loss of the ability to pursue a potentially lucrative individual claim for damages. *See* Compl. P 3 1. In explaining his theory of damages to us he adds that had "Conflicted Counsel timely informed the Named Class Representatives of the conflict, or withdrawn pursuant to the retainer agreements, the Named Class Representatives would have earlier engaged independent counsel to protect their personal interests. (** 12] Brief of Appellants at 17.

This separate counsel would have protected Thomas's personal interests, he thinks, by having the class action certified with opt-out provisions allowing for individual suits. In other words, if the class action had been certified under Federal Rule of Civil Procedure 23(b)(3), rather than Rule 23(b)(2), Thomas and his coplaintiffs would have been able to opt-out and pursue individual actions (in which they suppose they would have done better). [*265] *See* Compl. P P 13-14. To prove this case in the Superior Court, the plaintiffs would have to establish that they were damaged

because the *class should* have been certified under Rule 23(b)(3). *See Macktal v. Garde, III F. Supp. 2d 18, 21 (D. D.C. 2000)* (to prove malpractice, must establish that plaintiff had a valid claim); *Mosi v. Aiello, 69 A.2d 57, 60 (D.C 1949)* (same). But that necessarily would entail relitigating an issue already decided in the federal courts.

In Thomas v. Albright, 139 F.3d at 235, we rejected the district court's decision to create a hybrid class certified under Rule 23(b)(2) with an opt-out clause. *See Thomas, 139 F.3d at 230.* [**13] n2 The district court had made no Endings that the class was appropriately certified under Rule 23(b)(3); but the court had "made all the factual findings necessary to show that a hybrid class was not appropriate." *Thomas, 139 F.3d at 235.* We found it unnecessary to remand the case to the district court because "the dissidents do not allege any alternative basis that, if proved, would enable the district court upon remand to permit them to opt out." *Id. at 237.* In our view the claims of the dissident plaintiffs-Thomas and the others--were not "different in kind from those of other class members." *Id. at 236.* We thus held that the class was properly certified under Rule 23(b)(2) with no opt-outs. Thomas's malpractice action could survive only if that holding were relitigated and found to be incorrect.

> n2 Our conclusion in *Thomas* that there was no basis for certifying a hybrid class necessarily meant that there was no basis for certifying a class under Rule 23(b)(3). Though the case considered the propriety of a hybrid class action--which is different from a pure (b)(3) class action-we explicitly concluded that no plaintiffs claim was sufficiently atypical to justify permitting class members to opt out, which is the key characteristic of both hybrid and (b)(3) class actions. *See Thomas, 139 F.3d at 236.* If an

opt out right could not be justified, there would be no reason to certify the class action under 23(b)(3) rather than 23(b)(1) or (2). *See* I HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.20 (3d ed. 1992) (arguing that Rule 23 requires a court to certify a class action as a (b)(3) class action only if it cannot be certified under (b)(1) or (2)). Moreover, a hybrid class action is certified under *both* (b)(2) and (b)(3). *See Thomas, 139 F.3d at 234; Eubanks v. Billington, 324 US. App. D.C. 41, 110 F.3d 87, 96 (D.C. Cir. 1997).* By finding that a hybrid class action was unjustified, we necessarily found that the claims did not meet (b)(3)'s criteria for an opt out class action. *See Thomas, 139 F 3d at 235* (noting that the district court did not make findings necessary for a (b)(3) class action and then noting that "to the contrary, the court made all the factual findings to show that a hybrid class was not appropriate"). We therefore disagree with the dissent that the federal proceedings left open the question whether the class could be certified under Rule 23(b)(3).

[**14]

The only other claim Thomas might have is that the alleged defects in representation damaged him to the extent that he had to hire outside counsel to represent him in the fairness disputes. *See* Compl. P P 30, 39, 48, 57, 64. Under District of Columbia law, one can sue to recover the cost of retaining additional counsel in response to a lawyer's malpractice. *See Knight v. Furlow, 553 A. 2d 1232, 1235 (D.C. 1989).* But that narrow claim is undercut by Thomas's

own litigation posture here, which is that he wanted the opportunity to bring in individual counsel earlier in the process. It is senseless to suppose that damages resulted from failing to bring in individual counsel to advance the losing claim that the class should be certified either as a hybrid class or a Rule 23(b)(3) class. As we have held, that claim could prevail if and only if Thomas were permitted to relitigate the issues already decided in the class action.

We therefore conclude that if the Anti-Injunction Act applies to the District of [*266] Columbia, the relitigation exception to the Act permitted the district court to enjoin Thomas and his co-plaintiffs from pursuing their complaint in the Superior [**15] Court. Since Thomas has not argued that the court abused its discretion in issuing the injunction, we have no reason to question the court's judgment that the balance of interests, both public and private, weighed in favor of issuing the injunction. *See Thomas, 77 F. Stipp. 2d at 123-24.*

Affirmed.

DISSENTBY:

SENTELLE

DISSENT:

SENTELLE, *Circuit Judge, dissenting:* The decision reached by the majority in this case depends upon the proposition that all issues that could be raised in the malpractice action brought by Walter J. Thomas and his co-plaintiffs were precluded by the disposition of the class action. While this is almost true, I do not think it is entirely so.

In their complaint before the District of Columbia Superior Court, the plaintiffs allege that their counsel entered into a consent decree certifying the class pursuant to Rule 23(b)(2), "contrary to the express instructions and wishes of the Plaintiffs." The plaintiffs further allege that their attorneys breached a fiduciary duty because the plaintiffs "had rejected any compromise or settlement which would result in a certification of the class pursuant to Rule 23(b)(2), rather than 23(b)(3), which would [**16] allow the individual Plaintiffs to 'opt out' of the class in order to maintain their individual causes of action." It would appear that Thomas and his co-plaintiffs are stating, or attempting to state, a cause of action depending upon the propositions that class counsel had an individual duty to the plaintiffs and that the plaintiffs had instructed counsel not to agree to the (b)(2) certification. These propositions raise factual issues that should be resolved by the D.C. Superior Court.

When the district court approved the settlement in the underlying action and certified the class under Rule 23(b)(2), it noted that "Plaintiffs moved for certification under Rule 23(b)(2)." *Thomas v. Christopher, 169 F.R.D. 224, 239 (D.D. C. 1996).* Similarly, on appeal, this Court stated that "class counsel repeatedly requested certification

pursuant to (b)(2), [and] the consent decree stated that the parties agreed to certification pursuant to *(b)(2)." Thomas v. Albright, 139 F.3d 227, 235 (D.C. Cir. 1998).* Indeed, the consent decree barred the district court from "modifying the terms of the agreement." *Id. at* 233. Although the plaintiffs argued [**17] for the right to opt out of the settlement during the fairness hearings and again on appeal, they did so within the confines of Rule 23(b)(2). Their arguments would have been unnecessary if their counsel had negotiated for a Rule 23(b)(3) certification.

The majority mistakenly asserts that in order to prevail in their Superior Court case, "the plaintiffs would have to establish that they were damaged because the class *should* have been certified under Rule 23(b)0)." Slip Op. a 7. Rather to prevail, the plaintiffs simply would have to establish that the class could have been certified under Rule 23(b)(3). n1 That question has never been litigated.

> n 1 I disagree with the majority's analysis of the rules governing class actions. The majority states that "no plaintiffs claim was sufficiently atypical to justify permitting class members to opt out, which is the key characteristic of ... (b)(3) class actions." Slip Op. at 8 n.2. Rule 23(a) unequivocally states that one prerequisite to *any* class action is that the representative parties' claims are "typical of the claims ... of the class." FED. R. CIV. P. 23(a). Specifically, a 23(b)(3) class action is justified whenever "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R.

CIV. P. 23(b)(3). The district court undoubtedly could have certified the *Thomas* class under 23(b)(3), even though--and, perhaps, because--the plaintiffs' claims were "no different in kind from those of other class members." *139 F.3d at 236* Nevertheless, because the consent decree compelled the district court to certify the class under 23(b)(2), it had no reason to confront this question. *Cf. Eubanks v. Billington, 324 U.S. App. D.C. 41, 110 F.3d 87, 96 (D.C Cir, 1997)* (refusing to address whether "full (b)(3) protections" should be afforded to the plaintiffs because "the plaintiffs did not seek certification as ... a (b)(3) ... class").

[**18] [*267]

Although the plaintiffs were represented separately during the fairness hearings, they contend that they essentially were not represented at the table when counsel negotiated with the State Department. If they had been adequately represented, then their views on opting out surely would have been expressed in the precertification negotiations. If the plaintiffs had instructed counsel not to agree to a 23(b)(2) certification and if counsel had an individual duty to the plaintiffs (two very big "ifs"), then, as the plaintiffs allege, counsel may have violated its fiduciary duty by (1) not telling them about the conflict between the interests of the plaintiffs and the class as a whole and (2) not advocating the plaintiffs' position in the negotiations. These issues were not addressed by the district court in its initial decision or by this Court on appeal. In fact, these issues could not have been litigated because the consent decree negotiated by counsel locked the district court in to certifying the class pursuant to Rule 23(b)(2). *See Thomas, 139 F. 3d at 233.*

The majority assumes, without deciding, that the District of Columbia is a "State" within the meaning [**19] of the Anti-Injunction Act, *28 U.S.C. § 2283,* suggesting that the scope of the Act's relitigation exception "is the central issue in this case," Slip Op. at 2. In this case, the Court need not assume, much less decide, that the Act applies to D.C. n2 The scope of the relitigation exception is not the central issue in this case. With or without the Anti-Injunction Act, the United States District Court cannot enjoin the ongoing litigation in the Superior Court without some legal basis for doing so. Here, as I understand the appellees' complaint, the basis is that the issues involved in the Superior Court case have been heretofore litigated in the federal litigation. It may be that the appellees should ultimately prevail, but in my view it should be achieved after the litigation of what appear to me to be open issues in the Superior Court.

> n2 As I have noted before, some sections of the Court Reform Act, Pub. L. No. 91-358, 84 Stat. 473 (1970), require D.C. courts "to be treated as state courts, others do not." *United States v. Mills, 296 US. App. D.C. 65, 964 F.2d 1186, 1198 (D.C. Cir. 1992)* (en banc) (Sentelle, J., dissenting). "Congress has not, for example, plainly extended the prohibition upon the issuance of federal injunctions staying state court proceedings, *see 28 US.C § 2283,* to District proceedings." Id. Indeed, whether D.C. courts are protected by § 2283 is a valid question that has not been resolved. There is no reason to suggest that the Anti-Injunction Act plays any role in the outcome of this case.

[**20]

A court cannot issue a permanent injunction without first finding that the applicant has demonstrated actual success on the merits. *See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n. 12, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987).* Here, to establish success on the merits, counsel must show that Thomas and his co-plaintiffs are collaterally estopped from asserting the issues raised in their malpractice claims. The plaintiffs have not actually litigated the issues I discuss above, nor has any court decided those [*268] issues. Whether we apply the Anti-Injunction Act or the general law governing issue preclusion, our analysis is the same, and the district court plainly erred when it enjoined the D.C. Superior Court. *Compare Chick Kam Choo v. Euon Corp., 486 U.S. 140, 149, 100 L. Ed. 2d 127, 108 S. Ct. 1684 (1988)* (holding that for the Act! s relitigation exception to apply the party moving for an injunction must show that the issue "was itself actually litigated and decided by the District Court"), *with Davis v. Davis, 663 A.2d 499, 501 (D.C. 1995)* (explaining that issue preclusion applies when "the issue is actually litigated [**21] and ... determined by a valid, final judgment on me *merits'*).

The majority may be correct that Thomas and his coplaintiffs suffered no harm, but that seems to me a merits question and not a preclusion one. That is, if the injunction is lifted, it may well be that the Superior Court can rule that there is no harm, and therefore no cause of action, but I believe that is for the Superior Court to determine and not for us. Like my colleagues, I agree that Thomas and his coplaintiffs' malpractice claim is very shaky. Unlike my colleagues, however, I believe that ruling is not for this Court to make.

For these reasons, I respectfully dissent.

LEXSEE 77 F. Supp. 2d 114,AT 124

WALTER THOMAS, et al., Plaintiffs, v. MADELINE K. ALBRIGHT, Defendant

Civil Action No. 86-2850 (SS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

77 F. Supp. 2d 114; 1999 U.S. Dist. Lexis 19006

December 7, 1999, Decided
December 8, 1999, Filed

DISPOSITION:

[**1] Class counsel's application for permanent injunctive relief GRANTED, and Walter J. Thomas, Alan B.C. Latimer, Mary Cynthia Smoot, Odie Fields, and Alfred Neal, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, acting individually or as representatives of a class, enjoined from prosecuting the lawsuit styled Thomas, et al. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., et al., C.A. No. 1898-99 in the Superior Court for the District of Columbia.

CASE SUMMARY

PROCEDURAL POSTURE:

Class counsel filed an application for preliminary and pen-nanent injunctive relief. Class counsel sought to enjoin a lawsuit styled as a malpractice action brought in a state court by a group of five former class action plaintiffs.

OVERVIEW:

Class counsel filed an application for preliminary and permanent injunctive relief Class counsel sought to enjoin a lawsuit styled as a malpractice action brought in a state court by a group of five former class action plaintiffs. The former class action plaintiffs were a part of a group of African-American foreign service officers who sued their employer for racial discrimination. While that class action suit had settled, the five plaintiffs were dissident concerning its settlement, contending that their individual rights had been disserved by the class settlement. They had sought to opt out. After a fairness hearing, they were not permitted to opt out. The court granted class counsel's application to enjoin the malpractice suit against them. Class counsel's competence had been ruled on in the class action, barring collateral attack. Class counsel's responsibility was to the class as a whole, not to individual class members.

OUTCOME:

Class counsel's application to enjoin a malpractice suit brought by dissident class members was granted because counsel's competence had been established in the class action. Collateral estoppel barred relitigation of that issue.

CORE CONCEPTS

Civil Procedure: State & Federal Interrelationships: Anti-Injunction Act

See *28 US. CS, § 2283.*

Civil Procedure: State & Federal Interrelationships: Anti-Injunction Act

Civil Procedure: Preclusion & Effect of Judgments: Res Judicata

Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel

The exception provided in *28 US.C.S. § 2283* that allows an injunction in aid of the court's jurisdiction, or to protect or effectuate its judgments is commonly referred to as the "relitigation exception." The relitigation. exception allows a federal court to enjoin a state court action where, in effect, the state court is asked to relitigate matters already determined by a federal court, This is to preserve the full fruits and advantages of a federal Court's judgment. Under such circumstances, a federal court may issue an injunction to protect the finality of its judgment. Thus, a federal court may enjoin an action in a state court when issue preclusion (collateral estoppel) or claim preclusion (res judicata) is the source of the movant's application for relief.

Civil Procedure: Preclusion & Effect of Judgments Collateral Estoppel

Issue preclusion prevents a party in the same or subsequent action from gaining a redetermination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.

Civil Procedure: Class Actions

Class counsel is required to act in the best interests of the class considered as a unit.

Civil Procedure: Class Actions

Class counsel is responsible for protecting the interests of the class, even in circumstances where the class representatives -- their direct clients -- take a position that counsel considers contrary to those interests.

Civil Procedure : Injunctions

To succeed, movants must demonstrate a likelihood of success on the merits, that irreparable injury will result without injunctive relief, that no other parties will be harmed by a grant of such relief, and that the public interest is served by the issuance of the injunction.

COUNSEL:

For WALTER J. THOMAS, BERNARD JOHNS, plaintiffs: Charles Lindsay Warren, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, DC.

For WALTER J. THOMAS, BERNARD JOHNS, ARNOLD NC ISSACS, plaintiffs: Warren Eugene Connelly, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, DC.

For WALTER J. THOMAS, plaintiff. Barbara Bethune Hutchinson, New Carrollton, MD.

For WALTER J. THOMAS, BERNARD JOHNS, plaintiffs: Carl E. Anderson, WALTER & HAVERFIELD, Cleveland, OH.

For WALTER J. THOMAS, BERNARD JOHNS, ARNOLD M. ISAACS, plaintiffs: David Gregg Whitworth, Jr., WHITWORTH & SMITH, P.A., Crofton, MD.

For SUSAN E. ALEXANDER, ISAIAH M. ALDRIDGE, LAWRENCE [**2] ATCHERSON, HERMAN 0. BAILEY, JOHNEY BROOKS, TUSHINDE COOPER, E. LLOYD DAVIS, ODIE FIELDS, CASTE GHEE, CONSTANCE E. HUGGINS, ERIC JAMES, ALAN B.C. LATIMER, LISA LAYNE, MAURICE MCLEGGAN, ALPHONSO G. MARQUIS WARD D. MORROW, ALFRED NEAL, RAYMOND G. ROBINSON, MARY CYNTHIA SMOOT, MELVIN T. SPENCE, LAURANCE STANLEY, VANDOSTER TABB, JUDITH D. TONOHOU, AUBREY VERDUN, ROBERT WATKINS, DOROTHY WATSON, CHARLOTTE WILLIAMS, JOSZET H. ZIEGLER, JOHNITY MARY MILLER,

ANITA BANKS, intervenors-plaintiffs: Charles Lindsay Warren, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, DC.

For SUSAN E. ALEXANDER, ISAIAH M. ALDRIDGE, LAWRENCE ATCHERSON, HERMAN 0. BAILEY, JOHNEY BROOKS, TUSHINDE COOPER, E. LLOYD DAVIS, ODIE FIELDS, CASTE GHEE, CONSTANCE E. HUGGINS, ERIC JAMES, ALAN B.C. LATIMER, LISA LAYNE, MAURICE MCLEGGAN, ALPHONSO G. MARQUIS, WARD D. MORROW, ALFRED NEAL, RAYMOND G. ROBINSON, MARY CYNTHIA SMOOT, MELVIN T. SPENCE, LAURANCE STANLEY, VANDOSTER TABB, JUDITH D. TONOHOU, AUBREY VERDUN, ROBERT WATKINS, DOROTHY WATSON, CHARLOTTE WILLIAMS, JOSZET H. ZIEGLER, intervenors-plaintiffs: Warren Eugene Connelly, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, DC.

For SUSAN E. ALEXANDER, [**3] ISAIAH M. ALDRIDGE, LAWRENCE ATCHERSON, HERMAN 0. BAILEY, JOHNEY BROOKS, E. LLOYD DAVIS, ODIE FIELDS, CASTE GHEE, CONSTANCE E. HUGGINS, ERIC JAMES, ALAN B.C. LATIMER, LISA LAYNE, MAURICE MCLEGGAN, ALPHONSO G. MARQUIS2 MARY MILLER, WARD D. MORROW, ALFRED NEAL, DIANNA RITTER, RAYMOND G. ROBINSON, MARY CYNTHIA SMOOT, MELVIN T. SPENCE, LAURANCE STANLEY, VANDOSTER TABB, JUDITH D. TONOHOU, AUBREY VERDUN, ROBERT WATKINS, DOROTHY WATSON, CHARLOTTE WILLIAMS, HUGH WILLIAMS, JOSZET H. ZIEGLER, intervenors-plaintiffs: Joseph Marc Sellers, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC.

For SUSAN E. ALEXANDER, ISAIAH M. ALDRIDGE, LAWRENCE ATCHERSON, HERMAN 0. BAILEY, JOHNEY BROOKS, TUSHINDE COOPER, E.

LLOYD DAVIS, ODIE FIELDS, CASTE GHEE, CONSTANCE E. HUGGINS, ERIC JAMES, ALAN B.C. LATIMER, LISA LAYNE, MAURICE MCLEGGAN, ALPHONSO G. MARQUIS; MARY MILLER, WARD D. MORROW, ALFRED NEAL, DIANNA RITTER, RAYMOND G. ROBINSON, MARY CYNTHIA SMOOT, MELVIN T. SPENCE, LAURANCE STANLEY, VANDOSTER TABB, JUDITH D. TONOHOU, AUBREY VERDUN, ROBERT WATKINS, DOROTHY WATSON, CHARLOTTE WILLIAMS, HUGH WILLIAMS, JOSZET H. ZIEGLER, intervenors-plaintiff's: Carl E. Anderson, WALTER & HAVERFIELD, Cleveland, [**4] OH.

For ALAN B.C. LATIMER, intervenor-plaintiff. Barbara Bethune Hutchinson, New Carroliton, MD.

For ALPHONSO G. MARQUIS, WARD D. MORROW, ALFRED NEAL, RAYMOND G. ROBINSON, MARY CYNTHIA SMOOT, MELVIN T. SPENCE, ROBERTS WATKINS, DOROTHY WATSON, intervenors-plaintiffs: Theresa Grace Lawhorn Watson, Washington, DC.

For JAMES A. BAKER, III, defendant: Richard Neal Reback, U.S. DEPARTMENT OF INTERIOR, Washington, D.C.

For WARREN CHRISTOPHER, defendant: John Oliver Birch, Cynthia Ann Schnedar, U.S. ATTORNEY'S OFFICE, Washington , D.C.

For MADELEINE K. ALBRIGHT, federal defendant: Meredith Manning, U.S. ATTORNEY'S OFFICE, Washington, D.C.

For AKIN, GUMP, STRAUSS, HAUER & FELD, WARREN E. CONNELY, CHARLES L. WARREN, MICHAEL J. MADIGAN, JOSEPH M. SELLERS, AVIS E. BUCHANAN, Non Parties: S Robert Sutton, JANIS, SHUELKE & WECHSLER, Washington, D.C.

JUDGES:

Judge Stanley Sporkin, United States District Court.

OPINION BY:

Stanley Sporkin

OPINION:

[*166] **MEMORANDUM OPINION**

This matter is before the Court on Class counsel's application for preliminary and permanent injunctive relief. Class Counsel seeks to enjoin a lawsuit [**5] styled as a malpractice action brought in the Superior Court for the District of Columbia by a group of five former class action plaintiffs. n1

> n1 *Thomas, et al. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., et al.* C.A. No. 1898-99, Superior Court for the District of Columbia. The five plaintiffs in that case are Walter J. Thomas, Alan B.C. Latimer, Mary Cynthia Smoot, Odie Fields, and Alfred Neal; each either named plaintiffs or plaintiff-intervenors in the class action (sometimes referred to herein as the "dissident plaintiffs"). Judge Diaz of the Superior Court has stayed that matter pending the outcome of class counsel's application for injunctive relief here.

The Underlying Class Action

The substantive claims in this case have long since been resolved. In 1986, a group of African-American Foreign Service Officer ("FSOs") sued their employer, the United States Department of State. Plaintiffs alleged discrimination by the State Department in the assignment, promotion, tenuring, performance evaluation, [**6] and termination of African American FSOs. The lawsuit sought monetary damages and appropriate injunctive relief.

Following nearly ten years of extensive discovery and negotiations, a proposed settlement was reached by class counsel and the State Department in 1996. The parties agreed that the class should be certified for settlement under Rule 23(b)(2). The State Department agreed to a draft consent decree that required substantial changes in the Department's employment practices, and enjoined the agency from discriminating on the basis of race against African-American FSOs. Additionally, the Department agreed to pay $3.8 million in monetary damages, reinstate four terminated class members, and retroactively promote seventeen class members.

The law firm of Akin, Gump, Strauss, Hauer & Feld, L.L.P., through Warren E. Connelly, Charles L. Warren, and Michael J. Madigan, and others, served as counsel for the putative plaintiff class, and for the class as certified. Joseph M. Sellers and Avis E. Buchanan, of the Washington Lawyers' Committee for Civil Rights & Urban Affairs, also represented the class. This group of attorneys prosecuted the case and engaged the State Department in the [**7] settlement negotiations. N2 To help effectuate the settlement, class counsel and lawyers for the State Department agreed that the issue of whether any plaintiff could opt-out of the settlement would be a decision left solely for the Court to determine with class counsel taking no position on this issue. Class counsel communicated to the plaintiffs that the consent

decree would be silent on the opt-out issue, and that plaintiffs unhappy with the settlement could argue for the right to opt-out of the settlement before the consent decree was entered, at the fairness hearing to be conducted by the Court. n3

> n2 These attorneys are the named defendants in the Superior Court action.
>
> n3 Settlement of a class action lawsuit under Rule 23(e) requires court approval of the settlement and notice to the class members of the proposed settlement. Fairness hearings are con0ducted to solicit testimony and argument on the fairness of the settlement and adequacy of class counsel's representation of the class in negotiating the settlement.

[**8]

The five "dissident" plaintiffs each engaged separate counsel to represent their individual interests at the class action fairness [* 117] hearing. Thomas and Latimer were represented by Barbara B. Hutchinson; Fields, Neal, and Smoot retained Theresa L. Watson to represent their individual interests. Ms. Hutchinson was retained in December 1995, while the settlement was being negotiated. The dissident plaintiffs, and others, had hired Carl Anderson as additional co-counsel for the class in 1994, but terminated his representation before the fairness hearing in 1996. Court-approved notice of the proposed settlement was transmitted to all class members, informing them of their right to file comments concerning the proposed consent decree, and to appear at the hearing. The objections of Ms. Watson's and Ms. Hutchinson's clients were included in the notice sent to all class members.

The fairness hearing was held on three days in July 1996. At the hearing, the Court heard from every class member who requested an opportunity to speak, and from their legal representatives. Plaintiffs Thomas, Latimer, Fields, Neal, and Smoot, along with others represented by Ms. Watson and Ms. Hutchinson, objected [**9] to the consent decree on the ground that it failed to provide an adequate remedy for the wrongs alleged in the complaint. Those plaintiffs argued that they were not fairly compensated for their individual injuries. Those plaintiffs also made it clear that if the Court rejected their arguments and approved the settlement, they should have the right to individually pursue their underlying causes of action. In other words, those plaintiffs sought the right to opt-out of the settlement

On the merits of the compromise, the Court approved the settlement under Rule 23(e). It found the consent decree "as a whole [was] fair, reasonable, and adequate to the class," and "was clearly negotiated at arm's length and [presented] no danger of collusion." *Thomas v. Christopher, 169 F.R.D. 224, 239 (D.D.C. 1996), affd in part and revd in part, Thomas v. Albright, 139 F3d 227* (D.C. Cir.), *cert. denied, 525 US. 1033, 142 L. Ed. 2d 480, 119 S. Ct. 576 (1998).* The Court found the settlement to be in the best interests of the class as a whole. While the settlement may not have provided the degree of relief that some individual members sought, the Court approved [**10] the settlement based on the benefits it provided to the class generally. The Court specifically found "that class counsel .. fairly and adequately protected the interests of the class." *169 F.R.D. at 239.*

The Court addressed the opt-out issue at length. After hearing each of the individual plaintiffs' objections to the settlement, me Court found that some of the plaintiffs had individual equities that would not be satisfied by the agreement. Accordingly, the Court ordered the right to opt-out be made available to class members who did not believe

that the settlement and consent decree provided them with appropriate relief for the injury they sustained. It stated:

> If Defendant is right and those who want to opt out do have the strongest cases, what a grave injustice would then be done to those parties if the Court were to extinguish their individual rights.
>
> The Court has been impressed with the vehemence with which some members of the class have opposed the settlement. It is quite clear that those members will believe themselves to have been "sold out" if this Court refuses to allow opt out of the settlement.

Thomas v. Christopher, 169 F. R. D. at 245. [**11]

A group of unsatisfied class members, including the dissident plaintiffs, appealed. On appeal, they argued that the settlement (1) did not effectively address the Department's assignment system retaliatory acts, or employee records tarnished with discriminatory decisions; (2) did not provide adequate relief in the form of additional or enhanced promotions; (3) was insufficient regarding reinstatement; (4) did not adequately compensate the dissident plaintiffs; and (5) was improperly approved over the objections of the dissident plaintiffs, who were named plaintiffs. *Thomas v. Albright, [*118] 139 F.3d at 231-33.* Additionally, the dissidents argued that class counsel did not adequately protect the individual interests of the dissident plaintiffs when class counsel agreed to take no position on the opt-out issue, and agreed to a "no modifications" clause in the settlement agreement. The Court of Appeals noted succinctly that "the dissidents complain about particular

portions of the overall settlement and claim that they are individually entitled to more." *Id., 139 F. 3d at 233.*

Despite the dissidents' arguments, the Court of Appeals affirmed this Court's [**12] finding on the fairness of the settlement, and rejected the challenge to the adequacy of legal representation by class counsel. Particularly, the Court of Appeals wrote:

> Finally, the dissidents argue that class counsel did not act in the interest of the class when counsel agreed to argue that the consent decree was fair and not to advocate the right to opt out, and agreed to the provision of the consent decree stating that the court may not modify the agreement. In our view counsel more than adequately represented the class as a whole.

Thomas v. Albright, 139 F 3d at 233.

This Court's granting the right to dissenters to opt out of the settlement was reversed. The Court of Appeals held that under intervening law, that option was not available in this case. *Id., at 233-36, citing Eubanks v. Billington, 324 US. App. D.C 41, 110 F.3d 87 (D.C Cir. 1997).* This holding did not affect the findings that the settlement was fair, and that class counsel adequately represented the class.

The Superior Court Action

The class action having been finally and fully adjudicated, in March 1999, five dissident plaintiffs brought [**13] a lawsuit for alleged malpractice against class counsel in the Superior Court for the District of Columbia. The dissident plaintiffs alleged that under a retainer agreement with class counsel, signed by Walter Thomas and others,

class counsel was retained to represent plaintiff class members' individual claims as well as their putative class claims. The dissident plaintiffs alleged that class counsel owed fiduciary duties to Thomas and others, as their attorneys, including a duty to represent their interests "without undivided loyalty."

The dissident plaintiffs "do not take issue with this Court's decision on the adequacy" of class counsel's representation of the class, and are not trying to set aside the consent decree or obtain additional remedies not provided for in the settlement. These plaintiffs claim that the Superior Court malpractice action seeks only to recover damages against class counsel "due to the breach of the fiduciary duties owed to Thomas, et al. not as members of the class, but as individuals whom the Attorney Defendants signed retainer agreements with before the inception of the class." Thomas Response Brief at 11.

Class counsel, now defendants in the Superior [**14] Court, moved to dismiss the Superior Court action, stating that the fiduciary duty relied upon by the dissident plaintiffs is non-existent, and that the complaint is barred by the doctrine of collateral estoppel. Class counsel received a stay in that court pending the current motion for injunctive relief in this Court. Class counsel describes the so-called malpractice action as a "collateral attack" on this Court's decision, and states that it will suffer irreparable harm by having to endure wasteful relitigation of the adequacy of their representation of the dissident plaintiffs.

This Court has ancillary jurisdiction in this matter to vindicate its authority and effectuate its decree in the underlying class action settlement and consent decree. *See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994).* Neither party has suggested otherwise. Class counsel also suggests that the Court retains jurisdiction and injunctive power to [*I 191 effectuate its judgment under the All Writs Act, *28 U.S.C. § 1651.*

The Relitigation Exception to the Anti-Injunction Act

Class counsel argues that the Anti-Injunction [**15] Act, *28 US.C. § 2283,* does not preclude this Court from enjoining Plaintiffs' action in the Superior Court. The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 US.C § 2283. The purpose of the statute is to promote comity and avoid unseemly conflicts and friction between state and federal courts. *Signal Properties, Inc. v. Farha, 482 F.2d 1136* (5th Cir. 1973); *Euge v. Smith, 418 F.2d 1296 (8th Cir. 1969).* The statute was designed to precisely limit and describe a federal court's authority to enjoin state court actions.

The exception provided in the statute that allows an injunction "in aid of [the Court's] jurisdiction, or to protect or effectuate its judgments" is commonly referred to as the "relitigation exception." The relitigation exception allows a federal court to enjoin a state court action where, in effect, the state court is asked to relitigate matters already determined [**16] by a federal court. This is to preserve the "full fruits and advantages of a federal court's judgment." *In Re National Student Marketing Litigation, 655 F. Supp. 659, 664 (D.D.C 1987); see also Samuel C Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45, 49 (7th Or. 1976), cert. denied, 429 U& 1096, 51 L.Ed.2d 543, 97 S. Ct. 11 12 (1977).* Under such circumstances, a federal court may issue an injunction to protect the finality of its judgment. Thus, a federal Court may enjoin an action in a

state court when issue preclusion (collateral estoppel) or claim preclusion (res judicata) is the source of the movant's application for relief *Chick Kam Choo v. Exxon Corp., 486 US. 140, 147, 100 L. Ed. 2d 127o 108 S. Ct. 1684 (1988); Golden v. Pacific Maritime Ass'n, 786 F2d 1425o 1427 (9th Cir. 1986).* The central question is whether an injunction is necessary to protect or effectuate this Court's judgment entered in the class action. This question must be evaluated by first examining class counsel's argument that the Superior Court action is barred on grounds of issue preclusion.

Issue preclusion prevents [** 17] a party in the same or subsequent action from gaining a redetermination of an issue of fact or law when "(1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Davis v. Davis, 663 A.2d 499, 501 (D.C. 1995), quoting Washington Medical Center v. Holle, 573 A.2d 1269, 1283 (D.C. 1990).*

Class counsel argues that as a matter of law, judicial approval of the adequacy of class counsel's representation under Rule 23(e) necessarily precludes class members from later suing class counsel for alleged malpractice. Class counsel asserts that the adequacy of their legal representation of the dissident plaintiffs was litigated, and fully and finally decided by this Court. They state that the dissident plaintiffs' objections to the settlement and adequacy of class counsel were fully addressed at the fairness hearing. They note that the dissident plaintiffs were represented by individual counsel at the fairness hearing, and the Court was [**18] there presented with objections and argument on behalf of the dissidents. The Court, in approving the settlement, expressly found that class counsel adequately represented the plaintiffs, and class counsel submits that finding was necessary to the Court's approval of the settlement and consent decree under Rule 23(e).

Moreover, class counsel submits [*120] that the finding on the adequacy of class counsel was not mere dictum, but essential to the Court's judgment approving the settlement and consent decree. Accordingly, class counsel states that any claim alleging the inadequacy of class counsel would be precluded under the doctrine of collateral estoppel.

Class counsel points to cases in the Sixth, Ninth, Seventh, and Fifth circuits that support their position. In *Laskey v. International Union (UAW), 638 F. 2d 954 (6th Cir. 1981),* members of a class action sued class counsel for malpractice after the underlying class action was resolved by a judicially-approved settlement under Rule 23(e). As in this case, in *Laskey,* the dissatisfied class members claimed that class counsel's interests conflicted with their own; that counsel failed to inform members of their right to [** 19] opt-out of the settlement, failed to inform the class of counsel's claim for reimbursement from settlement proceeds, and that the court improperly accepted settlement over the named plaintiffs objections. The District Court granted summary judgment and injunctive relief in favor of class counsel, and the Sixth Circuit affirmed, stating:

> Since appellants had the opportunity to object to the legal representation at the prior settlement hearing and since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement ... appellants are collaterally estopped from now asserting that the legal representation was not adequate and that [class counsel] committed legal malpractice.

Laskey, 638 F. 2d at 95 7.

The Ninth Circuit, in *Golden,* also applied the "relitigation exception" in favor of class counsel to uphold an injunction against a state court malpractice and fraud proceeding. There, class counsel had successfully negotiated a judicially-approved consent decree, but dissatisfied plaintiffs sued class counsel in state court, alleging that class [**20] counsel falsely informed plaintiffs that their suit was not a class action, and that class counsel had falsely informed the District Court that plaintiffs endorsed the class action format and settlement. The District Court enjoined the state malpractice case, finding that the "conduct of [class] counsel and the relevant attorney-client relationship were litigated in the *Golden* action during the fairness hearings and addressed by (the] court after [plaintiffs] had a full and fair opportunity to present evidence in favor of their claims." *Golden, 786 F2d at 1428.* The Ninth Circuit affirmed that finding, noting that plaintiffs had a full and fair opportunity to litigate their malpractice and fraud claims at the fairness hearing, and that the state malpractice action was an attempt to harass class counsel and was in effect "an abuse of the court process." *Id. at 1429.* Class counsel also cite *Samuel C. Ennis & Co., Inc. v. Woodinar Realty Co., 542 F 2d 45 (7th Cir. 1976), cert. denied, 429 U.S. 1096, 51 L. Ed. 2d 543, 97 S. Ct. 1112 (1977)* (collateral estoppel precluded state malpractice action against bankruptcy [**21] attorneys because the bankrupt had a full and fair opportunity to litigate the fraud issue in the underlying bankruptcy work-out proceeding), and other cases where class action attorneys successfully enjoined state malpractice cases, through the relitigation exception, based on inherent findings of fairness and adequacy of representation in the underlying case. *See, In re Corrugated Container Litig., 643 F.2d 195 (5th Cir. 1981), rehg denied, 655 F.2d 1131 (5th Cir. 1981); Hutton Construction Co. v. County of Rockland, 1997 U.S. Dist. LEXIS 7666* (S.D.N.Y. June 2, 1997).

The dissident plaintiffs argue that in the underlying class action, while the fairness of the settlement and class counsel's representation of the plaintiff class was actually litigated, the discreet issue of whether those attorneys failed to properly represent the dissident plaintiffs individual interests was not a part of the fairness determination.

[*121] Plaintiffs argue that *Laskey* and the cases cited by class counsel are not applicable because in those cases, the dissident plaintiffs suggested malpractice arising out of class counsel's conduct in obtaining relief [**22] for the class. Plaintiffs claim that in their Superior Court action, they are not contesting the fairness of the settlement or the adequacy of class representation. Rather, they submit that the attorneys failed to properly represent the plaintiffs' individual interests, apart from the class, and thus collateral estoppel would not be applicable. Plaintiffs cite only one case for that proposition -- *Beckwith v. Llewellyn, 326 N. C. 569, 391 S. E. 2d 189 (N. C. 1990).*

In Beckwith, a woman brought a malpractice action against the attorney who had represented her and her children in her husband's wrongful death suit. The underlying wrongful death case had been settled for roughly $ 4 million. The settlement and the payment of attorneys' fees from the settlement were approved by the trial court, as required by North Carolina law where the deceased was survived by minor children--the would-be beneficiaries of the settlement. Plaintiff then filed the claim for malpractice against her attorneys, alleging that the calculation and payment of attorneys' fees was in excess of her initial agreement with counsel, and that counsel never informed the plaintiff that under a second [**23] agreement to represent the plaintiff, the fee calculation had changed. The trial court in the malpractice action granted summary judgment in counsel's favor on collateral estoppel grounds, but the North Carolina Court of Appeals reversed, finding that the plaintiffs complaint was grounded on allegations of breach of fiduciary

duties and negligence, and therefore "does not constitute a collateral attack by plaintiff on [the] settlement." *Beckwith, 391 S. E 2d at 190.*

Beckwith is distinguishable from the instant matter. In *Beckwith,* the complaining plaintiff and her trial attorneys were on the same side in requesting the trial court to approve the settlement along with counsel fees as being fair to the minors involved. The complaining plaintiff did not argue in the underlying matter that the settlement was unfair, or that counsel had taken advantage of her. Thus, the appellate court found that "the focus in the prior case was not whether the attorneys had taken advantage of their client but whether the settlement ... was fair to the minors involved. ... Plaintiff and her attorneys were on the same side." *Beckwith, 391 S.E. 2d at 191-92.*

In [**24] this case, the dissident plaintiffs *did* object to the terms of settlement, and argued that the settlement was unfair. They retained separate counsel to represent their individual interests at the fairness hearing. *In Beckwith* the trial court did not address the adequacy of counsel's representation of the plaintiff, but rather it only considered the fairness of the settlement to the minor children.

The Court finds that the adequacy of the representation provided by Akin, Gump and the Washington Lawyers' Committee for Civil Rights was actually litigated in this matter. The Court entered a valid, final judgment on the merits after a full and fair opportunity for the dissident plaintiffs to address the merits of class counsel's representation. In fact, those plaintiffs did make their objections known to the Court, and by their individual attorneys argued that the settlement did not fully address their individual rights. Indeed, this Court agreed with dissident. plaintiffs that they should be allowed to opt out of the settlement so that they could assert their individual causes of action.

The Court's finding that the settlement was fair, and that class counsel did in fact adequately [**251 represent the class was essential to its judgment. Rule 23(e) required the Courts finding of fairness as a condition to approval of the settlement. Thus, what is clear is that the settlement and consent decree rest on the essential finding that class counsel adequately represented the plaintiffs.

[*122] The dissident plaintiffs, through the Superior Court action, now seek from class counsel the monetary relief that counsel could not obtain in its negotiations with the State Department. While plaintiffs claim not to be attacking the settlement or consent decree, or the adequacy of class counsel's representation in negotiations with the State Department, it is impossible to read that action as anything but a collateral attack on the findings of this Court (and the Court of Appeals) that class counsel fairly and adequately carried out its duties to the members of the class.

Dissident plaintiffs' complaint that class counsel failed zealously to protect the individual interests of the plaintiffs, over those of the class, has no merit. First, the dissident plaintiffs had their own counsel representing their individual interests at the fairness hearing and beyond. That procedure assured that [**26] the interests of the dissident plaintiffs would be properly represented, and was the proper route to take when the conflict arose over the settlement. *See Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072 (2d Cir. 1995).* To argue that their individual interests were not zealously prosecuted is to ignore the role played by dissidents' individual counsel, who were retained while settlement negotiations were ongoing, and who appeared as counsel in the proceedings before this Court.

Second, the dissident plaintiffs' complaint that Akin, Gump and Lawyers' Committee attorneys failed to advance their individual interests runs counter to the requirements of class counsel in a class action. Class counsel is required to act in the "best interests of the class considered as a unit."

Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir.), cert. denied, *459 U.S. 828, 74 L. Ed. 2d 65o 103 S. Ct. 63 (1982).* The Manual for Complex Litigation states clearly that class counsel is responsible for protecting the interests of the class, "even in circumstances where the class representatives -- their direct clients -- take a position that counsel consider [**27] contrary to those interests." *Manual for Complex Litigation (Third)* § 30.43.

Clearly, the action in Superior Court thus attempts to relitigate issues that have already been finally and fully litigated in this forum -- the appropriateness of the representation of these plaintiffs by Akin, Gump and the Lawyers' Committee. That action can only be viewed as an attempt to attack and relitigate the findings of this Court and the Court of Appeals. As such, the dissident plaintiffs seek to burden class counsel with the needless expense of "relitigation" in Superior Court. If such a case were allowed to go forward, the consequences to future class actions could be quite severe. First, the threat of a state malpractice action, despite findings of fairness and adequacy of representation in the class action, could discourage future class counsel from attempting to settle and compromise a class action. This is especially true in cases where the class numbers in the hundreds or thousands of individual members -- it would be near impossible to satisfy the individual interests of every member of the class. And if class counsel did attempt to satisfy all of those interests, counsel's hands would [**28] be impossibly tied in any type of settlement negotiation. The result of such a policy is clear: more protracted litigation without settlement or compromise of the claims and allegations brought by the class. In actions where a class seeks prospective and retroactive injunctive relief, such handcuffing would sound a death knell to class counsel's ability to evaluate its case and negotiate a workable settlement in the best interest of the class as a whole, in a timely manner.

The threat of a malpractice suit of this kind could significantly discourage attorneys from bringing future meritorious class actions. Groups like the Lawyers' Committee, and law firms that are willing to devote their resources essentially on a *pro bono* basis, would be greatly discouraged from reaching out to help deserving class litigants if to do so would likely expose them to the "double jeopardy" of a [* 123] state malpractice action. n4 In a world fraught with numerous injustices that can only be vindicated through the vehicle of a class action, attorneys should not be dissuaded from bringing meritorious actions by the threat of a state court malpractice law suit.

> n4 This case lasted over a period of ten years. Class counsel at the Lawyers' Committee, Akin, Gump, and Walter & Haverfield devoted more than 30,000 hours litigating and negotiating the settlement, which provided S 1.4 million for legal fees, approximating S 47 per hour, well below those attorneys' normal hourly rates and the D.C. Circuit guidelines. *See Thomas v. Christopher, 169 F.R.D. at 235.* It is clear that this case was taken on a quasi-pro bono basis, in the best traditions of the legal profession.

[**29]

The Court is concerned that allowing the malpractice action to proceed necessarily implies a nullification of this Court's findings on the adequacy of counsel's representation of the plaintiffs. It removes one of the Court's most important functions in a class action - protecting the interests of the class members through fairness hearings and other procedures designed to assure that members of the class as a whole are not compromised by the individual interests of a minority of the

class, or possibly by the vindictiveness of a few. The Court expects that its findings on the fairness of a settlement, adequacy of notices, and adequacy of class representation are final and have the force of law. The dissident plaintiffs' attempt to relitigate this Court's findings through the ruse of a so-called malpractice action would have the effect of undermining the settlement and consent decree reached in this matter.

Injunctive Relief

Having found that the dissident plaintiffs are to be collaterally estopped from relitigating this Court's decision in *Thomas v. Christopher,* through the guise of a state court action styled as a malpractice lawsuit or otherwise, the Court now considers [**30] the appropriateness of injunctive relief.

To succeed, movants must demonstrate a likelihood of success on the merits, that irreparable injury will result without injunctive relief, that no other parties will be harmed by a grant of such relief, and that the public interest is served by the issuance of the injunction. *Washington Metro Area Transit Commn v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841, 844 (D.C Cir, 1977); Serono Laboratories v. Shalala, 158 F.3d 1313 (D.C. Cir. 1998).* As discussed above, movants have demonstrated a likelihood of success on the merits.

The injury to class counsel by having to endure wasteful relitigation in state court of an issue already finally decided by this Court is clearly irreparable. See *Laskey, 638 F.2d at 957; Golden, 786 F.2d at 1428-29; Ennis, 542 F.2d at 49-50.* Additionally, the Court finds that the potential for nullification or compromise of the Court's judgment in the underlying matter is sufficient alone to constitute irreparable injury to class counsel and class members who have received the benefit of the settlement and consent decree. [**31] *See Royal Ins. Co. v. Quinn-L Capital Corp., 759 F. Supp. 1216, 123 7 (N.D. Tex. 1990), revd in part on other grounds, 960 F.2d 1286 (5th Cir. 1992).*

The harm to other parties, particularly the dissident plaintiffs who brought the malpractice suit, is limited at best. Those plaintiffs, as class members, were entitled to receive the benefits resulting from the settlement of the class action. Those plaintiffs already have been given an adequate forum (i.e. at the fairness hearing) to air their individual grievances. Their objections were taken into account by this Court. After hearing their objections to the settlement, the Court granted them the right to opt out of the settlement. Although the Court of Appeals did not agree with his determination, the dissidents' position was given full consideration. Fairness does not require that plaintiffs be afforded still another opportunity to air their grievances in the form of a malpractice action in state court.

[*124] What is more, injunctive relief in this case is in the public interest. The public interest favors finality of Court judgments. Further, injunctive relief will promote the justifiable use of the federal [**32] class action device in meritorious cases without exposing counsel to duplicative state court lawsuits when class counsel properly discharges their duties to the class as a whole. The public interest is served by reducing the potential for the constant relitigation of issues between this nation's state and federal court systems. *Royal, 759 F. Supp. at 1237-38.*

In accordance with the above an injunction will issue precluding the dissident plaintiffs from prosecuting their action in Superior Court.

Date: 12/7/99 /s/ Judge Stanley Sporkin
United States District Court

ORDER

This matter comes before the Court on class counsel's application for preliminary and permanent injunctive relief. Class counsel seeks to enjoin prosecution of a lawsuit styled *Thomas, et al. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., et al.*, C.A. No. 1898-99, which is currently filed in the Superior Court for the District of Columbia.

A hearing was held on class counsel's application for relief on October 29, 1999, and parties' positions were fully briefed and argued. For the reasons set forth in the accompanying Memorandum Opinion, it is, this Seventh day of December, [**33] 1999:

ORDERED that class counsel's application for permanent injunctive relief is GRANTED, and it is further

ORDERED that Walter J. Thomas, Alan B.C. Latimer, Mary Cynthia Smoot, Odie Fields, and Alfred Neal, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, acting individually or as representatives of a class, are hereby enjoined from prosecuting the lawsuit styled *Thomas, et al. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., et al.*, C.A. No. 1898-99 in the Superior Court for the District of Columbia,

SO ORDERED.

December 7, 1999 /s/ Judge Stanley Sporkin
United States District Court

9 of 47 DOCUMENTS

WALTER J. THOMAS, ET AL., APPELLEES/CROSS-APPELLANTS, v. MADELEINE K. ALBRIGHT, SECRETARY OF STATE, APPELLANT/CROSS-APPELLEE

No. 97-5004 Consolidated with 97-5018

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

139 F.3d 227; 1998 U.S. App. LEXIS 6177; 77 Fair Empl. Prac. Cas. (BNA) 227; 74 Empl. Prac. Dec.(CCH) P45, 535; 40 Fed. R. Serv. 3d (Callaghan) 558

November 13,1997, Argued
March 27,1998, Decided
March 27, 1998, Filed

SUBSEQUENT HISTORY:

[**I] Certiorari Denied November 30, 1998, Reported at: *1998 U.S. LEXIS 7592.* Certiorari Denied November 30, 1998, Reported at: *1998 U.S. LEXIS 7841.*

PRIOR HISTORY:

Appeals from the United States District Court for the District of Columbia. (No. 86cvO2850).

DISPOSITION:

Affirmed the district court's decision that the consent decree is fair and reasonable, but reversed its decision allowing opt-outs.

COUNSEL:

Cynthia A. Schnedar, Assistant U.S. Attorney, argued the cause for appellant/cross-appellee, with whom Mary Lou Leary, U.S. Attorney at the time the briefs were filed, John D. Bates, R. Craig Lawrence, and John Oliver Birch, Assistant U.S. Attorneys, were on the briefs.

Barbara B. Hutchinson argued the cause for appellees/cross-appellants Walter J. Thomas, et al., with whom Theresa L. Watson was on the briefs.

Avis E. Buchanan, argued the cause for amicus curiae plaintiff class, with whom Warren E. Connelly, Charles L. Warren, Richard P. Schlegel, and Joseph M. Sellers were on the briefs.

JUDGES:

Before: EDWARDS, Chief Judge, GINSBURG, Circuit Judge, and BUCKLEY, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge GINSBURG.

OPINIONBY:

GINSBURG

OPINION:

[*229] GINSBURG, *Circuit Judge:* This is a Title VII class action in which the plaintiffs allege that the United States Department of State discriminated [**2] against African-American Foreign Service Officers. The Department and a group of nine class members separately appeal from the district court's approval of the class settlement. The Department appeals the district court's decision to permit class members to opt out of the class settlement. The nine cross-appellants challenge the district court's approval of the consent decree as fair and reasonable. We affirm the district court's decision that the consent decree is fair and reasonable, but reverse its decision allowing opt-outs.

I. Background

In 1984 Walter J. Thomas, a former Foreign Service Officer, filed an administrative complaint on behalf of himself and other African-American FSO, alleging racial discrimination in the Department's employment practices. In 1986, after the Department had rejected Thomas' complaint, he and another former FSO filed a class action complaint in district court alleging that the Department engaged in racially discriminatory employment practices and retaliated against those who complained about them. *Thomas v. Christopher, 169 F. R. D. 224, 229 (D. D. C. 1996).*

The plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b)(2). [**3] The court denied their motion but permitted the plaintiffs to file an amended complaint adding several more plaintiffs. The parties conducted discovery for six years and, beginning in 1993, engaged in settlement negotiations, eventually under the supervision of a magistrate judge. In 1994 the plaintiffs filed another motion for class certification, in which they contended that although their class could be certified pursuant to Rule 23(b)(3), "it is more appropriately maintained as a Rule 23(b)(2) class action." The court deferred ruling upon this motion pending the outcome of the settlement negotiations.

In 1995 the parties reached a settlement in principle, and in January 1996 they signed a consent decree. The consent decree "resolves all claims that were or could have been brought" by African-American FSOs between 1984 and 1996 based upon racial discrimination in promotions, awards, tenuring, termination, performance reviews, assignments, and training, or upon retaliation for complaining about such discrimination. The parties agreed that the court would certify the class pursuant to Rule 23(b)(2).

The consent decree provided for the following relief:

(1) Monetary Relief--The [**4] Department agreed to pay a total of $3.8 million, to be allocated as follows: (a) $125,000 for the named plaintiffs $40,000 to Thomas for "his leadership and coordinating role" and $85,000 divided equally among the 29 other named plaintiffs); (b) $2.9 million for those who experienced delays in and denials of promotions, to be allocated upon the basis of a formula specified in the consent decree, but not to class members who would receive a promotion under the consent decree or who had been promoted at the same rate as white employees; and (c)$775,000 for class members who had been terminated, of which at least $200,000 was to be distributed formulaically to those who were either terminated for unsatisfactory performance or constructively discharged, and up to $575,000 of which was reserved for a maximum of four recipients to be chosen upon the basis of, among other things, the severity of the discrimination and the degree of economic hardship they had suffered.

(2) Promotions--The Department agreed to give retroactive promotions to the 16 mid-level class members and to the one senior-level class member who had been at their [*230] current grade-levels for the longest time and [**5] had been recommended previously for promotion.

(3) Reinstatement--The Department agreed to offer a new five-year appointment to each of four class members who had been fired when they failed to get tenure within the required time.

(4) Injunctive and Prospective Relief--The Department agreed to: (a) submit to an injunction against its discriminating on the basis of race or retaliating for equal employment opportunity activities; (b) create a council for Equality in the Workplace to monitor the EEO activities of the Department; (c) modify its employee evaluation reports and engage a consultant to help determine whether further revisions are necessary; (d) revise and expand its diversity and EEO training; (e) establish a working group to monitor the grant of awards to employees; (f) use its best efforts to include an African-American on any board considering an African-American for termination; (g) continue development of an electronic personnel database to monitor employment actions; (h) report employment and EEO information to class counsel for four years; and (i) adopt an affirmative action plan approved by the Equal Employment Opportunity Commission.

(5) Attorneys' Fees--The Department [**61] agreed to pay $2.1 million in attorneys' fees, plus an additional amount for any services rendered after the district court s preliminary approval of the consent decree.

Class counsel and the Department also entered into a letter agreement providing that (1) the consent decree would not address the issue of opt-outs; and (2) class counsel would (a) support the settlement in court as "fair and reasonable to the class as a whole"; (b) not take a legal position regarding opt-outs other than to advise the court that it "may have the discretion to allow opt outs", and (c) not advocate that class members opt out.

In March the district court held a two-day hearing and preliminarily approved the consent decree. The court then ordered that the consent decree and notice of the fairness hearing be sent to all known class members. 169 *F.R.D. at*

231. The notice advised class members that the court might grant them the right to opt out. Of 359 class members, 34 wrote the court in support of the consent decree and 55 wrote in opposition. *169 F.R.D. at 235.*

In June class members were informed of their individual awards under the consent decree. The Department, as agreed, retroactively promoted 17 [**7] class members and reinstated four. It awarded an average of $ 10,900 in promotion damages to 265 class members. Twenty-nine class members received an average termination award of $16,400, and the four class members who had incurred the greatest injuries received an average termination award of $75,000. *Id. at 234-35.*

At the fairness hearing later that month 14 class members testified; three supported the consent decree, eight opposed it, and three were "ambivalent or neutral." *Id. at 235.* The court required the Department to send notices to opponents of the agreement informing them that if they wished to opt out then they had to file a motion stating "the reasons for this request, and any law" supporting it. Of the nineteen class members who filed motions to opt out all but nine chose ultimately to remain in the class.

The court certified the class under Rule 23(b)(2) and approved the consent decree pursuant to Rule 23(e). The court found that the settlement was "negotiated at arm's length and presents no danger of collusion"; it then held that the consent decree was fair and reasonable in light of the disputed evidence and the risks of litigation. Nonetheless, the court [**8] allowed those class members so desiring to opt out of the consent decree. Id. *at 239-44.*

II. Analyst

The Department of State appeals the district court's decision permitting opt-outs, while the cross-appellants, nine members of the plaintiff class, object to the court's approval of the consent decree. Class counsel submitted a brief in support of the consent decree but did not take a position concerning the dissidents' right to opt out.

[*23 1] A. Fairness of the Consent Decree

Rule 23(e) states that "[a] class action shall not be dismissed or compromised without the approval of the court." Before it can approve a settlement a district court "must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); see Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996); Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir. 1988); Grant v. Bethlehem Steel Corp., 823 F2d 20, 22 (2d Cir. 1987).* The court's primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case. *See, e.g., Ishy, 75 F.3d at 1199.* The court should [**9] not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial. *See EEOC v. Hiram Walker & Sons, Inc., 768 F2d 884, 889 (7th Cir. 1985); see also United States v. Trucking Employers, Inc., 182 U.S. App. D.C. 315, 561 F.2d313,317(D.C Cir. 1977).*

The dissident members of the class in this case contend that for a host of reasons the district court abused its discretion in approving the consent decree as fair. We conclude, to the contrary, that the settlement is eminently fair and reasonable to the class as a whole.

First, with respect to the class-wide relief the dissidents complain that the consent decree does not (1) alter the Department's allegedly discriminatory assignment system, (2) give any "relief for retaliatory acts taken by the Department," or (3) provide for the expungement of employee records infected with discrimination. In making the first two charges the dissidents seem oblivious to the significant monetary, reinstatement, and promotional relief awarded to class members who claim the Department discriminated or retaliated against them. Moreover, the injunction prohibits discrimination [**10] in general and in assignments in particular, forbids retaliation, and prescribes monitoring procedures so that class counsel can ensure the Department complies. Together these provisions of the consent decree both redress past and deter future discrimination in assignments and inhibit future retaliation. Finally, although the consent decree does not provide for expungement of employee records potentially tainted by discrimination, it does require revisions to the employee evaluation reporting form in order to help prevent racial discrimination in the future.

Second, the dissidents argue that the consent decree is inadequate with respect to the compromise of claims regarding discrimination in promotions. While the district court found no statistically significant evidence of such discrimination in the junior and senior grades, the plaintiffs did present statistical evidence suggesting that there had been between 40 and 47 fewer promotions, primarily in the mid-level grades, than there would have been but for discrimination. The Department presented its own statistical evidence suggesting that the shortfall was at most 10 promotions. The district court reasonably determined that in [**11] view of the conflicting evidence, the compromise calling for 17 promotions was fair and reasonable. Moreover, those who were not awarded a promotion received monetary compensation for delays in and denials of promotions.

Relatedly, the court did not abuse its discretion in approving the provision of the consent decree calling for only one promotion to be made in the senior grades; there was no statistically significant evidence of any shortfall of promotions in those grades. Nor did the district court abuse its discretion when it concluded that the consent decree was fair in awarding retroactive promotions only to those active FSOs who had been at their current grade the longest and who had been recommended for but not granted a promotion. To determine which individual class members would have been promoted but for discrimination would have been difficult for all concerned, wherefore we cannot say that the quick and dirty alternative upon which the parties settled was unreasonable. We reject also the dissidents' contention that it was unfair not to provide any monetary award to those who received a promotion. A settlement necessitates compromise, and the agreement that some individuals [**12] would get a promotion while others would get cash is not an unreasonable way to allocate two scarce resources.

[*232] Third, the dissidents contend that the consent decree is insufficient regarding reinstatement. They argue that (1) four reinstatements was too few; (2) the reinstatements went only to employees who were terminated when they failed to get tenure and not to tenured employees who were terminated for allegedly poor performance; and (3) those who were reinstated should have received tenured positions rather than returning as untenured employees. The parties presented conflicting evidence regarding whether there was a statistically significant excess in the number of African-American employees terminated. The Department's expert argued that employees terminated when they did not get tenure should be treated separately from tenured employees fired for performance-related reasons because the two types of adverse decisions are unrelated. Nonetheless, the Department's expert opined that terminations of neither tenured nor untenured African-American employees were significantly above the norm.

We conclude that the district court properly held both that four was a reasonable number [**13] of reinstatements and that the agreement limiting reinstatement to those who were terminated for failing to reach tenure was fair in light of the parties' competing statistical analyses and the risks attendant to litigation. Further, although the number of reinstatements was limited to four, 29 of the 30 employees who applied for termination damages received a monetary award. Again, the dissidents have not shown that this division of the settlement proceeds is unreasonable considering the interests of the class as a whole. As for the reinstatements being without tenure, none of the dissidents appears to be among those reinstated; therefore, the dissidents do not have standing to pursue this particular objection to the class settlement. *See Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1181 (5th Cir. 1978)* ("Appellants who were excluded from the subclass and denied back pay lack standing to contest the adequacy of the awards received by other class members").

Fourth, the dissidents appear to complain that they did not receive sufficient monetary relief. We conclude, however, that the district court did not abuse its discretion in approving as fair, adequate, and reasonable [**14] the amount of the damages provided in the consent decree. Class counsel estimated the Department's overall exposure to liability at from $2.5 million to $4 million while the Department put the figure at from $725,00 to $10 million; each side had reasonable arguments for its position. Based upon the conflicting evidence and arguments, the risks of litigation, and the time value of money, the district court reasonably determined that the $3.8 million upon which the parties had sewed was "at the high end" of what the class could have expected after trial. The dissidents complain that the settlement "unfairly limited monetary relief for egregious acts of discrimination to four persons." The dissidents provide no reason why it was unfair to award an average of

$75,000 in damages to the four most significantly injured of the terminated class members. A claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement; as we indicated above, a settlement necessitates compromise.

Fifth, the dissidents argue that it was improper for the court to approve the settlement over the objections of a large number of [**15] class members, including several of the named plaintiffs. But a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it. *See Grant, 823 F.2d at 23; Hiram Walker, 768 F-2d at 891-92; Cotton, 559 F.2d at 1331; Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975); cf. Pettway, 5 76 F. 2d at 1215-1 7* (acknowledging general rule but holding settlement unfair where approximately 70% of class and all named plaintiffs objected). Here only 15% of the class members objected; 85% accepted the settlement, and many of them actively supported it. The district court did not abuse its discretion, therefore, in approving the settlement in spite of some opposition.

The dissidents cite *Ficalora v. Lockheed California Co., 751 F.2d 995 (9th Cir. 1985),* [*233] and *Mandtyano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976),* for the proposition that it is an abuse of discretion for a district court to approve a settlement over the objection of the named class members. The teaching of those cases, however, is that the district court must consider the objections raised by the named plaintiffs. *Ficalora, 751* [**16] *F.2d at 997;MandiYano, 541 F.2d at 836-37. In MandiYano* the court also said that the opposition of a significant number of named plaintiffs "is a factor to be considered when approving a settlement." *541 F.2d at 837.* Here the district court conducted hearings and permitted all interested parties, including the dissidents, to testify. The court considered the objections of the plaintiffs but pointed out that "the best interests of the class as a whole must

remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled." *169 F.R.D. at 243.* The district court's decision is therefore consistent with the Ninth Circuit cases cited.

Finally, the dissidents argue that class counsel did not act in the interest of the class when counsel agreed to argue that the consent decree was fair and not to advocate the right to opt out, and agreed to the provision of the consent decree stating that the court may not modify the agreement. In our view counsel more than adequately represented the class as a whole. The letter agreement to which the dissidents point was part of a global compromise [**17] between the parties, who had negotiated their settlement only after significant discovery and under the supervision of a magistrate judge. In view of the complexity and fragility of such a compromise, the provision prohibiting the court from modifying the terms of the agreement is understandable as being in the interests of both parties; it is not indicative that class counsel acted in any way at the expense of the class.

In sum, the dissidents complain about particular portions of the overall settlement and claim that they are individually entitled to more. It is the obligation of the district court, however, to evaluate the fairness of the settlement to the class as a whole. We conclude that the district court did not abuse its discretion in approving the consent decree as fair, adequate, and reasonable to the class as a whole.

B. Opting Out

The Department argues that our recent decision in *Eubanks v. Billington, 324 US. App. D. C 41, 110 F.3d 87 (D.C Cir. 1997),* holding that a court may permit members of a class certified under Rule 23(b)(2) to opt out of the class action and thus retain the right to sue on their own, is invalid after the still more recent decision of [** 1 8] the Supreme Court in *Amchem Products, Inc. v. Windsor, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).* Alternatively, the Department contends that under the criteria of *Eubanks* the district court abused its discretion in permitting the dissidents to opt out. We conclude that *Amchem* does not affect our holding in *Eubanks,* but we agree with the Department that under *Eubanks the* district court abused its discretion in permitting the dissidents to opt out.

Rule 23(a) establishes four prerequisites for certifying a lawsuit as a class action. They are that

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides for three types of class actions. Subsection (b)(1) allows a class action if separate actions would risk inconsistent adjudications or if individual adjudications would "be dispositive of the interests of the other members not parties ... or substantially [**19] impair or impede their ability to protect their interests." Under subsection (b)(2) a class action may be maintained where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

[*234] Finally, a subsection (b)(3) class action is appropriate where

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The requirements of predominance and superiority in subsection (b)(3) are, of course, additional to the requirements of subsection (a), which applies to all class actions. The right to opt out of a subsection (b)(3) class action is expressly provided in Rule 23(c)(2).

In *Amchem* the Supreme Court addressed the procedure for approving a class action settlement. In that case the parties had simultaneously filed a class action complaint, an answer thereto, and a settlement agreement. [**20] The district court certified the class action under Rule 23(b)(3) and approved the settlement. The Third Circuit reversed, holding that the district court should have evaluated whether to certify the class just as it would have done if the action were going to be tried. *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624-26 (1996).*

The Supreme Court affirmed the judgment of the court of appeals although it clarified that "settlement is relevant to a class certification" in that, if the case is surely going to be settled, then the "district court need not inquire whether the case, if tried, would present intractable

management problems." *Amchem Prods., Inc. v. Windsor, 138 L. Ed. 2d 689, 117 S. Ct. 2231, 2248 (1997).* A "settlement-only class certification" does, however, depend upon compliance with all the requirements of Rule 23(a) and (b). The Court made clear that a district court is to adhere closely to the rule:

> Of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce.
>
> ***
>
> Federal courts ... lack authority to substitute for Rule 23's certification criteria a standard never adopted--that [**21] if a settlement is "fair," then certification is proper.

117 S. Ct at 2248, 2249.

The Department contends that this court's recent decision in *Eubanks* was effectively overruled by the Supreme Court's direction in *Amchem* that courts are bound to observe strictly the requirements of Rule 23. *Eubanks* was a Title VII class action brought against the Librarian of Congress and certified under subsection (b)(2). The district court approved the parties' settlement and held that even if there were a right to opt out of a subsection (b)(2) class action, the individual plaintiffs had failed to show that they were entitled to opt out. Upon appeal we held that, although the district court may in certain circumstances permit members of the plaintiff class to opt out of a (b)(2) suit, the court in that case had not abused its discretion in declining to do so. We recognized that Rule 23 does not "address the possible need for opt-out rights in non-(b)(3) actions," but we thought the Rule "sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions" in certain circumstances. *Eubanks, 110 F. 3d*

at 93, 94. We based that ruling [* *22] upon Rule 23(d)(5), which specifically authorizes the court to make "appropriate orders" to govern "procedural matters" in a class action; subsection (d)(5) is broad enough, we held, to permit the district court to provide for opt-outs when appropriate in (b)(1) and (b)(2) class actions. *See id. at 96; see also* Fed. R. Civ. P. 23(d) advisory committee's note (1966) (stating that subsection (d) "is concerned with the fair and efficient conduct of the action").

We went on to say that the district court may, when necessary to the fair and efficient conduct of the litigation, exercise its discretion to allow opt-outs in at least two ways.

First, if the court finds that "the assumption of cohesiveness" underlying certification of a (b)(2) class is inapplicable to the individual class members' claims for monetary damages, then it may certify a hybrid class action under subsections (b)(2) and (b)(3)--the latter of which contemplates individual damages determinations *Eubanks, 110 F.3d at 96.* Second, if the court determines [*235] that particular plaintiffs' claims are "unique or sufficiently distinct from the claims of the class as a whole," as, for example, where a member of the [**23] plaintiff class had filed Is own civil action before the class action was filed, *see, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304-05 (2d Cir. 1990),* then it may permit opt outs "on a selective basis." *Eubanks, 110 F. 3d at 96*

Nothing in the interpretation of Rule 23 we advanced in *Eubanks* is inconsistent with the Supreme Court's subsequent decision in *Amchem.* The district court s error in *Amchem* had been in substituting me fairness inquiry of Rule 23(e) for the certification requirements of Rule 23(a) and (b). In *Eubanks* we did not omit or even relax any requirement of Rule 23; rather, we held only that in certain limited circumstances the district court has discretion under subsection (d)(5) to permit opt-outs, notwithstanding the absence of a specific authorization in subsection (b)(2).

In the alternative the Department argues that the district court abused its discretion by permitting opt-outs because it did not follow either of the options for doing so outlined in *Eubanks*. When the district court issued the decision now before us, *Eubanks* had not yet been decided. Relying instead upon *Holmes v. Continental Can* [**24] *Co., 706 F2d 1144 (11th Cir. 1983),* the district court asserted that allowing opt outs is appropriate "when the monetary relief stage ... is functionally more similar to a (b)(3) class than to a (b)(2) class." *169 F.R.D. at 244.* The court was "impressed with the vehemence with which some members of the class have opposed the settlement" and noted its "concern" that "in the absence of allowing for 'opting out' some searing individual injury might be greatly under compensated," *Id. at 245.*

We agree that the district court abused its discretion when it allowed class members to opt out of the settlement in this case. The district court did not pursue either of the two options we later approved in *Eubanks,* nor did it adduce any other tenable ground upon which opting out might be permitted. Indeed, the dissident plaintiffs do not argue that their case fits within either of the two circumstances instanced in *Eubanks,* nor do they suggest any alternative basis upon which we can uphold the decision of the district court.

First, the district court clearly did not certify a hybrid class action based upon a finding that "the assumption of cohesiveness for purposes of injunctive [**25] relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages." *Eubanks, 110 F.3d at 96.* Class counsel repeatedly requested certification pursuant to (b)(2), the consent decree stated that the parties agreed to certification pursuant to (b)(2), and the court ultimately certified the class pursuant to (b)(2). Although the district court in allowing opt-outs did refer to the distinction between a (b)(2) and a (b)(3) class

action, the court did not purport to hold, and did not make findings sufficient to support the conclusion, that a hybrid class certification was appropriate: The court found neither that the assumption of cohesiveness underlying a (b)(2) class certification was unjustified with respect to plaintiffs' individual claims for monetary damages, nor that the monetary or other individual claims were appropriate for certification under (b)(3). Nor did the district court address the predominance and superiority requirements for certification under (b)(3). To the contrary, the court made all the factual findings necessary to show that a hybrid class was not appropriate. The court determined that [**26] the plaintiffs sought "extensive injunctive and systemic relief in addition to monetary damages," *169 F.R.D. at 239,* and found that the plaintiffs' "predominantly equitable claims ... arose from a system of personnel actions that have been uniformly imposed on all class members," *id. at 238.*

We recognized in *Eubanks* that whenever individual plaintiffs in a subsection (b)(2) class have claims for different amounts of damages, their interests may begin to diverge. *110 F.3d at 95.* As noted above, however, before hybrid certification is appropriate there must be some reason to believe that the assumption of cohesiveness underlying a subsection (b)(2) class action does not [*236] apply to the individual claims for monetary damages; for example, the amounts claimed by various class members may be so disparate as to create a conflict of interest within the class. Here the district court did not find that the assumption of cohesiveness had broken down; nor do the dissident plaintiffs so argue before this court.

Second, the district court did not find that the claims of the individual dissidents are so atypical of the claims of the class as to justify permitting them to opt out of the class. [**27] The court stated that there might be some class member(s) with a "searing individual injury" who would be "under compensated" if limited to the relief provided in the

consent decree. The court did not determine, however, that there are in fact such persons in the class, let alone that the dissidents are among them. The dissidents do not even argue that they have suffered an unusually grave degree of injury; rather, they argue merely that they stand to be under compensated for their injuries. As we made clear in *Eubanks,* however, that is not a sufficient justification for permitting members of the class to opt out:

> That ... appellants received less under the settlement agreement than they might have expected to receive had they prevailed in individual lawsuits cannot alone justify an opt-out, as no party can reasonably expect to receive in a settlement precisely what it would receive if it prevailed on the merits.

Id. at 98. Moreover, this argument was more properly directed to the issue of fairness, *id. at 98-99,* and as such it was rejected both by the district court in the fairness hearing and by this court (in Part II.A, above). Nor are the dissidents' [**28] claims different in kind from those of other class members: In certifying the class the court specifically found that the claims of the named plaintiffs, including eight of the nine cross-appellants, were "typical" of the claims of the class as a whole. *169 F.R.D. at 238.*

Third, although the district court could properly rely upon *Holmes* before we issued *Eubanks,* it erred in its application of that case and thereby abused its discretion. *See Koon v. United States, 518 US. 81, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392 (1996)* ("A district court by definition abuses in discretion when it makes an error of law"). In *Holmes* the court held that "the presence in the lawsuit of a significant number of atypical claims not common to the class" required the district court to permit opt-outs. *706 F.2d at 1155.* The court also suggested that the assumption of

cohesiveness in Rule 23(b)(2) claims for injunctive relief may break down when there are individual claims for disparate amounts of monetary damages and that in such cases opt-outs may be required. *Id. at 1159-60.* As we have pointed out, however, here the district court did not find (and the dissidents do not contend) [**29] that the dissidents' claims are atypical or that the assumption of class cohesiveness has broken down.

The dissidents argue, at least implicitly, that they should be permitted to opt out because several of them had individual discrimination complaints pending against the Department. In *Eubanks,* however, we rejected the contention that a pending administrative complaint--as opposed to a lawsuit filed in court--is sufficient to support a class member's preference to opt out of a class action. *See 110 F.3d at 97.* One may not, by first filing an administrative charge and then affirmatively joining a class action as a named plaintiff or an intervenor, obtain the option to see whether the result in the class suit is satisfactory and, if not, then to take up the administrative charge again.

The dissidents also argue, as they emphasized at oral argument, that they must be permitted to opt out because they object to the settlement of their individual claims (as opposed to the class claims). This is not the law; otherwise members of the plaintiff class would have to be allowed to opt out whenever there are individual claims for monetary damages in addition to class claims for injunctive [**30] relief *Eubanks* itself involved claims for injunctive as well as monetary relief, however, and we upheld the district court's decision not to permit opt-outs. Insofar as the dissidents mean to suggest that their individual claims for monetary damages are somehow unique or atypical, as noted above they give us no reason to accept that conclusion.

[*237] We hold, therefore, that the district court abused its discretion in permitting the dissident class members to opt out of this class action; the district court

made no findings that would support opting out under *Eubanks*. Nor is it necessary to remand the case for the district court to make further findings in light of *Eubanks;* the Department argued in its brief that a remand was not necessary, and the dissidents did not seek a remand to develop the record further in the event we determined that *Eubanks* was not satisfied. Moreover, the dissidents do not allege any alternative basis that, if proved, would enable the district court upon remand again to permit them to opt out.

III. Conclusion

For the reasons stated above, we hold that the district court did not abuse its discretion in approving the fairness of the consent decree. [**31] We also conclude that *4mchem* does not undermine this court's holding in *Eubanks,* and that the district court abused its discretion in permitting some members of the class to opt out of the settlement of this case. Accordingly, we uphold the district court's approval of the consent decree and direct that it be made binding upon all members of the class.

So ordered.

LEXSEE 169 F.R.D. 224,AT 229

WALTER J. THOMAS, et al., Plaintiffs, v. WARREN CHRISTOPHER, Secretary of State, Defendant.

Civil Action No. 86-2850 (SS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

169 F.R.D. 224; *1996 U.S. Dist.* LEXIS *16894*

November 7, 1996, Decided
November 7,1996, Filed

COUNSEL:

[**I] For WALTER J. THOMAS, plaintiff: Charles Lindsay Warren, Warren Eugene Connelly, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Washington, DC. Barbara Bethone Hutchinson, New Carrollton, MD. Carl E. Anderson, WALTER & HAVERFIELD, Cleveland, OH.

For BERNARD JOHNS, plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Carl E. Anderson, (See above).

For SUSAN E. ALEXANDER, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS, Washington, DC. Carl E. Anderson, (See above).

For ISAIAH M. ALDRIDGE, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For LAWRENCE ATCHERSON, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For HERMAN O. BAILEY, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For JOHNEY [**2] BROOKS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For TUSHINDE COOPER, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Carl E. Anderson, (See above).

For E. LLOYD DAVIS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For ODIE FIELDS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For CASSIE GHEE, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For CONSTANCE E. HUGGINS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For ERIC JAMES, intervenor-plaintiff. Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, [**3] (See above). Carl E. Anderson, (See above).

For ALAN B.C. LATIMER, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Barbara Bethone Hutchinson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For LISA LAYNE, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For MAURICE MCLEGGAN, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For ALPHONSO G. MARQUIS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhom Watson, LAW OFFICES OF EVA P. BRITT, Washington, DC. Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For MARY MILLER, intervenor-plaintiff.- Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For WARD D. MORROW, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhom Watson, (See above). Joseph Marc Sellers, [**4] (See above). Carl E. Anderson, (See above).

For ALFRED NEAL, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhom Watson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For DIANNA RITTER, intervenor-plaintiff: Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For RAYMOND G. ROBINSON, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhom Watson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For MARY CYNTHIA SMOOT, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhom Watson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For MELVIN T. SPENCE, intervenor-plaintiff. Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhom Watson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For LAURANCE STANLEY, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). [**5] Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For VANDOSTER TABB, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For JUDITH D. TONOHOU, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For AUBREY VERDUN, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For ROBERT WATKINS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhorn Watson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For DOROTHY WATSON, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Theresa Grace Lawhorn Watson, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For CHARLOTTE WILLIAMS, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See [**6] above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For HUGH WILLIAMS, intervenor-plaintiff: Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For JOSZET H. ZIEGLER, intervenor-plaintiff: Charles Lindsay Warren, (See above). Warren Eugene Connelly, (See above). Joseph Marc Sellers, (See above). Carl E. Anderson, (See above).

For JAMES A. BAKER, III, defendant: Richard Neal Reback, U.S. ATTORNEY'S OFFICE, Washington, DC.

For WARREN CHRISTOPHER, Secretary of State, defendant: John Oliver Birch, Cynthia Ann Schnedar, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES:

Stanley Sporkin, United States District Judge

OPINIONBY:

Stanley Sporkin

OPINION:

[*228] MEMORANDUM OPINION

This matter comes before the Court for consideration of a Consent Decree entered into by the parties. Plaintiffs' case was originally brought in October of 1986, so it has taken ten years to reach this proposed settlement. The Court attributes this delay to the complexity of the action and the settlement discussions, as well as to the untimely death of the judge to whom this case was originally assigned.

The Consent Decree seeks to resolve all claims that were or could have [**7] been brought under Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. §§2000e-16* et seq., by any African-Americans who were "Foreign Service Generalist Officers" or "Foreign Service Generalist Officer" career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree.

The Court held preliminary fairness hearings on the proposed Consent Decree on March 21, 1996 and March 21, 1996. The Court held additional hearings on July 15, 1996, July 22, 1996, July 23, 1996 and September 19, 1996. During those hearings, the Court heard sworn testimony from members of me putative class who both supported and opposed the consent decree. The Court also heard argument on various matters related to the Consent Decree by counsel for the parties.

Members of the Plaintiff class testifying at those hearings have identified several issues that were of concern to the Court in its evaluation of the proposed Consent Decree. The Court has corresponded with the Secretary of State in an effort to address some of those concerns, and the correspondence is a part of the record. Several of these issues have subsequently been addressed [**8] by the Department of State and the Court hopes that several other

concerns will yet be addressed by the Department. One issue, that of possible "opting out" of the class of present and former FSOs by those who desire to do so, will be resolved by the Court's decision here.

[*229] The Court has reviewed the parties' Proposed Joint Findings of Fact and Conclusions of Law and adopts them as its own with certain minor modifications. The Court's Findings of Fact and Conclusions of Law follow.

FINDINGS OF FACT

Background

In June 1984, Walter J. Thomas, an African-American former Foreign Service Officer ("FSO"), filed an administrative EEO class complaint on behalf of himself and other African-American FSOs, alleging discrimination regarding post and duty assignments, performance appraisals, promotions, censuring, and selection out. In May 1986, Bernard Johns, who is also an African-American former FSO, filed an individual administrative complaint alleging racial discrimination for failure to promote him from grade FO-02 to grade FO-01 and for not receiving an assignment for which he had bid.

Following denial of Mr. Thomas' class complaint by the agency, on October 17, 1986, Walter J. [**91 Thomas and Bernard Johns filed their original complaint in this action. The complaint alleged that the Department of State engaged in discriminatory employment practices and retaliatory behavior in violation of Title VII of the Civil Rights Act of 1964, as amended, *42 US.C §§ 2000e* et seq. Specifically, the complaint asserted that: (1) the State Department discriminated against black FSOs in assignments, performance appraisals, promotions, tenure, and selection out and (2) that the Department had retaliated against black FSOs for objecting to these unlawful employment practices.

The State Department denied each of Plaintiffs' allegations, contending that: (1) the Department had complied with the letter and spirit of Title VII, and (2) the Plaintiffs did not satisfy the requirements for class certification. Plaintiffs filed their first motion to certify the lawsuit as a class action on January 15, 1987, prior to taking any discovery. They sought certification of a class of all black Foreign Service Officers and career candidates employed by the Department of State at any time after January 20, 1984. Plaintiffs' motion for class certification was denied by Judge Revercomb on July [**10] 20, 1987.

On April 28, 1988, Judge Revercomb denied reconsideration of the motion to certify a class action, but granted Plaintiffs' motion to file an amended complaint thereby allowing 30 additional individuals to intervene in order to assert claims of discriminatory employment practices and retaliatory behavior against the Department similar to those asserted by Plaintiffs Thomas and Johns. Following several status conferences, the Court indicated it would consider a renewed motion to certify the class.

Between 1988 and 1994, class counsel obtained in discovery more than 60,000 documents, and hundreds of answers to interrogatories, and they took more than 60 hours of depositions of State Department witnesses regarding the employment practices at issue. In addition, class counsel retained Economic Research Services, Inc. ("ERS"), a Tallahassee, Florida, based economic consulting firm which has considerable experience in employment discrimination cases, to perform statistical and other studies on a "stipulated" computerized database of information provided by the State Department in discovery. This database consists of 93 separate computer tapes and over 1000 pages of explanatory [**II] memoranda, printouts, and other documents. Working at Kass counsel's direction from 1988 through 1995, ERS performed numerous alternative analyses of more than one million individual personnel transactions

recorded on the database occurring from 1981 through 1994, pertaining to over 6000 FSOs of all races. The primary objective of these analyses was to determine whether statistically significant evidence of racial discrimination against African-American FSOs existed in any State Department employment practices covered by the complaint.

The State Department retained Longbranch Research Associates to create the stipulated data base and to analyze data with respect to Plaintiffs' allegations in this case.

On December 6, 1991, shortly after the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100, the [*230] Plaintiffs moved the Court for leave to file a Second Amended Complaint to demonstrate that their claims against the Department were based on a disparate impact as well as a disparate treatment theory of liability and to request a jury trial, compensatory damages, prejudgment interest, and expert fees, which were not available to Plaintiffs prior to the enactment [**12] of the Civil Rights Act of 1991.

By order dated June 2, 1993, the Court established December 1, 1993 as the date for filing a renewed motion for class certification. At the parties' request, on September 21, 1993, the Court suspended discovery and the previously established litigation schedule in order to pen-nit the parties to pursue settlement negotiations. After the deadline for completing those negotiations was twice extended, and in the absence of an imminent settlement, on February 14, 1994, the Court directed counsel for the Plaintiffs to file their renewed motion to certify a class by June 15, 1994.

On June 2, 1994, Plaintiffs withdrew their Second Amended Complaint, on which the Court had not yet ruled, and moved the Court for leave to file a Third Amended Complaint which renewed the claims in the Second Amended Complaint, designated four additional class representatives, and updated certain factual representations. On June 8, 1994, the Court granted Plaintiffs' motion.

Plaintiffs filed their Motion for Class Certification on June 15, 1994, and the State Department filed its opposition to Plaintiffs' motion on September 14, 1994. Both parties supported their filings with [**13] detailed affidavits from their statistical experts. However, as a result of the progress reported by the parties in settlement discussions which continued, at the Court's request, under the supervision of Magistrate Judge Alan Kay, the class certification hearing was scheduled and postponed several times. During negotiations, the parties met with Magistrate Judge Kay on more than 15 occasions.

In February 1995, counsel for the class and the Department reached an agreement in principle to settle the case. Various Plaintiffs opposed some of the elements of this agreement. Negotiations between the parties continued in order to finalize the details. On January 31, 1996, counsel for the plaintiff class agreed to recommend a settlement to the approximately 360 class members. The terms of the settlement are embodied in a Consent Decree, which was signed by counsel for the parties on January 31, 1996, and then submitted to the Court for its approval.

To determine whether the proposed Consent Decree was fair, reasonable, and adequate, the Court followed the two-step procedure suggested in the Manual for Complex Litigation § 30.44, at 241-42 (2d ed. 1985). First, the Court held a Preliminary [**14] Hearing on March 20, 1996. This was: (1) to determine whether the proposed agreement was within the range of an acceptable settlement justifying final approval and, if so, (2) to arrange for providing notice to the members of the class and affording them a hearing to determine whether final court approval should be granted. At the Preliminary Hearing, the Court heard extensive presentations from counsel for the parties, counsel for individual class members, and, separately, from 13 class members. The Court granted preliminary approval on March 22, 1996.

The second stage of the settlement approval process involved sending the proposed Consent Decree to every known member of the class together with a court approved notice informing all class members of their right to file comments, objections, and any statement of interest in opting out of the settlement. Class counsel, counsel for the defendant, and counsel for some of the individual Plaintiffs all reviewed the notice prior to its approval by the Court. This notice also informed all class members of their opportunity to appear and be heard at a Fairness Hearing on July 15, 1996. The Court's March 22, 1996 order and the Fairness Hearing [**15] Notice stated that class members' responses to the Notice and comments on the Consent Decree must be received by the Court on or before June 11, 1996.

With respect to the Fairness Hearing on July 15, 1996, the court-approved notice was sent during the first week of April 1996 to all known class members as follows:

(a) To class members in the Foreign Service assigned to State Department positions [*231] in the United States and to class members separated from the Foreign Service but employed by the State Department in a Civil Service or contractor position, the required documents were delivered by State Department internal mail. The documents delivered through the State Department's internal mail included an "Acknowledgment of Receipt" form and a pre-addressed envelope to use to return the confirmation form.

(b) To class members in the Foreign Service assigned to non-State Department positions in the United States and to class members who are separated from the Foreign Service but who do not work for the State Department in another capacity and whose last known address is in the United States, delivery was via U.S. registered or certified mail, return receipt requested.

(c) [**16] To class members in the Foreign Service assigned to U.S. Government facilities overseas, delivery was via U.S. Department of State pouch.

Of 359 known class members who were sent notice, approximately 30 notices were either returned or delivery was not acknowledged. No class member indicated any deficiencies in nature or timeliness of the notice provided to them. Nor did any class members complain of lack of opportunity to present to the Court their views in opposition to or in favor of the settlement.

In addition, in accordance with Section 108 of the Civil Rights Act of 1991, *42 U.S. C. § 20OOe-2,* all FSOs and career candidates employed by the State Department as of March 22, 1996, the date of Preliminary Approval, were provided notice that one or mom of me terms of the settlement might adversely affect their interests and legal rights and to advise them of the opportunity to file objections or comments and to appear at the July 15, 1996 Fairness Hearing. Accordingly, the Court finds that the conditions of Section 108 of the Civil Rights Act of 1991 were satisfied and that the terms of the Consent Decree may not be challenged hereafter by anyone who either had actual notice [**171 of the settlement or whose interests were adequately represented by another person who presented objections at the Fairness Hearing.

The notice of the July 15, 1996 hearing was reasonably calculated, under all of the circumstances, to apprise interested parties of the proposed settlement and afford them an opportunity to comment on the terms of the Consent Decree. *See, e.g., Weinberger v. Kendrick, 698 F.2d Go 70-71 (2d Cir. 1982) (citing Mullane v. Central Hanover Bank & Trust* Co., *339 U.S. 306i 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)), cert. denied, 464 US. 818; see also, Grunin v. International House of Pancakes, 513 F.2d 114, 120 (8th Cir. 1975)(11the* mechanics of the notice process are left to

the discretion of the court subject to the broad 'reasonableness' standards imposed by due process"), *cert. denied, 423 US. 864, 46 L. Ed. 2d 93, 96 S.Ct. 124 (1983).* The Consent Decree and Fairness Hearing Notice delivered to class members and other individuals reasonably conveyed the information that was required to be communicated and afforded a reasonable time for those interested to comment on the proposed settlement. The objectors had adequate and reasonable [** 18) opportunity to formulate and present meaningful objections to the proposed settlement. In all, nearly 11 weeks were available for the preparation and filing of objections between Preliminary Approval of the proposed settlement on March 22, 1996, and the deadline for filing objections on June 11, 1996.

Based on the foregoing, and all other evidence before the Court, the Court finds that pursuant to the requirements of Rule 23 and due process, proper notice of the proposed class certification and terms of the settlement was given to class members.

Relief to the Plaintiff Class in the Settlement

The Court finds that the settlement provides fair, reasonable and adequate relief to the class, as follows:

1. Prospective and Injunctive Relief

The Consent Decree provides that an injunction will be entered, effective for four years from the date of this Court's Preliminary Approval, prohibiting the State Department [*232] from discriminating on the basis of race in promotions, awards, censuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments, or training. The injunction also bars the State Department from retaliating against any [**191 class member for participation in equal employment opportunity activities.

The Consent Decree requires the following significant internal State Department reforms:

Council for Equality. The Consent Decree provides for a senior level Council for Equality in the Workplace to monitor and advance equal employment opportunities in the Department. The Council will consist of eight high-ranking members of the Department selected by the Secretary of State, including at least one African-American, and will be chaired by the Under Secretary of State for Management. In response to a suggestion from the Court, the Secretary of Saw agreed to appoint one additional Council member from outside the State Department and to meet personally on an annual basis with this Council. The Council will review annually data on the racial profile of post and duty assignments and honor award recipients within each Bureau and across the Department, including the profiles of Ambassadorial positions, Assistant Secretary and Deputy Assistant Secretary positions, and all other "program direction" positions. Following its review of the data, reports from Assistant Secretaries and Bureau heads, the Council [**20] will meet with Assistant Secretaries and bureau heads to make policy recommendations concerning employment practices that advance the goals of equal employment opportunity in the Foreign Service. Class counsel may submit reports to the Council regarding barriers to advancement or imbalances in opportunity in the Foreign Service on the basis of race, which they or members of the class believe exist at the State Department. The Council will also provide class counsel with copies of its annual reports.

Job Analysis/EER Revision. The State Department, with the assistance of an expert consultant, will hire a contractor to conduct a comprehensive job analysis of FSO job duties, including an assessment of the knowledge, skills and abilities needed by FSOs. The expert consultant will then recommend whether the current Employee Evaluation Report ("EER") form used to evaluate FSOs should be

modified to ensure that the potential of tenured FSOs is assessed on the basis of the knowledge, skills, and abilities necessary to perform successfully at the next higher grade and that racial bias is minimized in that assessment, Class counsel will play an active role, particularly in such areas [**21] as selecting the expert consultant, reviewing the draft Statement of Work for the contract solicitation, participating on a committee to advise the contractor, and reviewing the results of the job analysis and the underlying data. Performance appraisals determine who is promoted and who is selected out. These steps are designed to assure that the Foreign Service evaluation system relies on objective criteria to predict future success and to address the other concerns that motivated the class action.

EEO/Diversity Awareness Training. The State Department will revise and expand its EEO/Diversity Awareness training and require priority participation by all supervisors of FSOs and, eventually, by all FSOs. The revised training courses draw on successful programs used by other agencies and by private industry. They teach management methods that foster equality in the workplace and avoid discrimination in evaluations, assignments, and awards. The value of this provision lies in its potential to continue to change attitudes and behavior in the Department long after the Decree itself has expired. Plaintiffs' counsel already have reviewed a draft agenda for each course, including a [**22] description of all activities and the goal of each activity.

Superior Honor Awards. The Director General appointed a working group to review individual Superior Honor Award Nominations to determine whether these awards reflect the racial composition of the bureaus in the Department and, if not, to examine the circumstances under which the imbalances occurred, and to make recommendations [*233] to redress any particular or systemic problems that are identified. The purpose is to

prevent future racial imbalance in the selection process, unless the working group finds legitimate (i.e., performance-based) reasons for the imbalance. Class counsel, after receipt of the raw data provided to the working group, may submit their own recommendations to the working group. Class counsel will also be offered the opportunity to review the report of the working group and to make such suggestions as counsel believe are warranted.

Certification of Selection Out Process. When a Performance Standards Board ("PSB") is considering an African-American FSO generalist for possible selection out, the Department will make its best efforts to include at least one African-American member on the Board. [**23] The Department will notify class counsel of its efforts in each instance in which an African-American member is not included on such a PSB. In addition, the Department will certify that the PSB received a briefing on EEO and made is decision on the factors identified in applicable precepts.

Electronic Database. The Department will establish an Integrated Personnel Management System ("IPMS"). The IPMS will permit the Department to collect and analyze data pertaining to personnel functions including but not limited to promotions, awards, censuring, and terminations by race.

Affirmative Action Plan. The Department will maintain and revise the current EEOC-approved affirmative action plan applicable to members of the Foreign Service.

Monitoring. The Consent Decree provides a mechanism for class counsel to monitor the Department's compliance with the consent decree. For a total of four years, commencing on t e date the Court gave Preliminary Approval to the Consent Decree, the Department shall report the following information, covering the preceding twelve months, to class counsel: total FSO generalist population statistics; program direction, stretch, and training [**24] assignments; tenure decisions; honor awards; diversity training; promotions; and selections out. The Consent

Decree also provides a mechanism for the parties to resolve disputes concerning application of or compliance with the consent decree. All reports will be filed with the Court, to enable it, as appropriate, to engage in an independent assessment of the implementation of the Consent Decree.

At the Fairness Hearing, Plaintiffs' expert on prospective relief gave his opinion that, after participating in extensive discussions with the State Department and consultations with class members, he had come to believe that the Consent Decree embodies significant reform measures designed to eliminate the barriers to advancement by class members. He also gave his expert opinion that the monitoring and accountability systems in the Decree were "state-of-the art."

2. Retroactive Relief

Sixteen class members will receive immediate promotions within the midlevel grades, and one class member will be promoted in the Senior Foreign Service from grade FE-OC to FE-MC. To maximize the remedial long-term effect on discrimination in the Department's personnel system, the seventeen promotions [**251 will be awarded to class members currently active in the Foreign Service who have been at their present grade for the longest period of time and who were recommended but not reached Or promotion from that grade.

The Consent Decree provides for the selection of an impartial review panel (the "Review Panel") to make reinstatement decisions and decisions concerning termination damages. The panel consists of three members, one chosen by the 30 original named Plaintiffs, one chosen by class counsel, and the third chosen by the first two members. The Panel member chosen by the Plaintiffs through a nomination and voting process is a social anthropologist, an educator, and a former country director in the Peace Corps. Class

counsel chose an attorney who served as counsel to the Deputy Attorney General, exercising oversight responsibility for issues affecting civil and political rights, and who [*234] previously worked in the Civil Rights Division of the Justice Department, Those two Panel members selected as the third panelist a former FSO who served as Ambassador to Malawi and Uganda and as Consul General in Capetown. Following their selection, and subsequent to an interview with the Court, Panel [**26] members received court appointments.

Their work and decisions, cloaked in quasi-judicial immunity, were discharged in exemplary fashion.

The Panel completed its work successfully and, on July 11, 1996, submitted to the Court its Decisions and Recommendations.

The Department will provide reinstatement with new five year limited term appointments as Junior Officer Candidates to four class members who did not obtain tenure while they served as Foreign Service Officer career candidates. The four reinstatements were offered to individuals selected by the Review Panel from a negotiated list of eligible class members according to the criteria set forth in the Consent Decree. The factors for selection included: (1) evidence that the class member was recommended for tenure by a Foreign Service Commissioning and Tenure Board but did not receive career status for other reasons, e.g. failure to clear language probation; (2) evidence of the percentage of recommendations for tenure based on the number of performance evaluations that are officially part of the class member's performance file; and, (3) evidence of the time the class member spent in the Foreign Service before being separated. A list [**27] of class members eligible for reinstatement is contained in a Confidential Exhibit to the Consent Decree.

The agreement provides for the class to receive a total award of $ 3.8 million in satisfaction of all class claims for monetary relief. $ 125,000 will be distributed to the 30 named Plaintiffs (or their estates) in recognition of their efforts to resolve the class action successfully, including $40,000 to Walter J. Thomas, the lead plaintiff, n1 and $85,000 pro rata among the 29 other named Plaintiffs.

> n1 Mr. Thomas has elected to opt out of the settlement, so he will not receive this or any other sum from the settlement.

$2.9 million will be distributed to class members who did not receive promotions or whose promotions were delayed. That money will be distributed according to a formula based on the amount of promotion delay experienced by each class member beyond the median time calculated by Plaintiffs' expert for white male FSOs.

A total of $775,000 has been divided into two pools for distribution [**28] to class members who may have been "selected out," i.e., terminated, for race-related reasons. Pool A (at least $200,000) will be allocated on a formula basis to 29 class members who were terminated from the Foreign Service on the grounds of "unsatisfactory performance" or who were considered constructively discharged according to the impartial Review Panel established by the terms of the Consent Decree and approved by the Court. Pool B ($575,000) will be distributed to four members of Pool A based on a number of specified criteria applied by the Review Panel as described in Appendix F of the Consent Decree. Pool B is available to a maximum of four class members in Pool A because that is a reasonable estimate of the number of excess terminations shown by statistical analysis. The monetary award to any individual from Pool B is capped at $ 250,000.

During the first week in June 1996, class members were notified of the preliminary calculations of the amount of their individual "promotion damages" awards. Under the terms of the Consent Decree, 265 class members would receive an average award for promotion damages of S 10,900. Class members who did not qualify for this type of award (**29] include those who were promoted at or faster than white males, the comparison group used for damages calculations or those who were excluded under the damage distribution provision of the Consent Decree (Exhibit F) because they achieved the personal rank of Career Minister or Career Ambassador, or because they served as Chief of Mission regardless of personal rank. Seventeen class members who upon final approval of the Consent Decree will receive immediate promo6ons [*235] to the next highest grade were also notified of their promotions in early June 1996.

The Review Panel also reviewed the applications of eight class members who applied for reinstatement and, as provided for in the Consent Decree, selected four. The Panel also analyzed the applications of thirty class members who applied for "termination damages" awards from "Pool A" and "Pool B." The Panel selected twenty-nine class members, who will receive an average Pool A award of $16,400. The panel then selected four class members for Pool B and awarded them an average of $75,000. The Pool B awards ranged from $40,000 to $120,000. All Pool A and Pool B recipients were notified of their awards in early June.

Ninety-one of 359 [**30] class members, as well as two non-class members, filed comments regarding the Consent Decree. Thirty-four class members submitted comments in support of final approval of the Consent Decree and fifty-five class members objected to various provisions. Class members filed objections claiming inadequate individual and/or class-wide relief, inadequate injunctive and/or prospective relief, and inadequate monitoring

provisions. Several class members did not identify their objections. Two non-class members filed objections asserting that the relief provided by the Consent Decree constitutes reverse discrimination.

At the July 15, 1996 Fairness Hearing, the Court heard from all class members who appeared and chose to testify. Of the 14 who spoke, 3 testified in favor of the settlement, 8 were opposed, and 3 were ambivalent or neutral. Two groups of objecting Plaintiffs retained separate counsel to present their objections. The Fairness Hearing continued on July 22 and on July 23 to permit counsel to respond to the Court's questions about the Consent Decree. At the close of the July 23 hearing, the Court directed the State Department to send a second notice to the twenty-seven class members [**31] who had indicated through testimony at the Fairness Hearing or in written comments their preliminary interest in "opting out." The notice required those twenty-seven to file a motion to opt out, to explain the reasons for their request, and to provide the legal authority which supported their request. The notice required those class members to respond by September 3, 1996.

Nineteen class members filed motions with the Court seeking to opt out of the settlement (three class members subsequently withdrew their motions and have been reinstated in the settlement). The Consent Decree itself does not expressly permit or prohibit opting out. The State Department maintains that the Court does not have the legal authority to permit "opt outs" under the circumstances of this case because the class sought certification under Rule 23(b)(2). Counsel for the 16 class members who seek permission to opt out contended that the Court has the discretion to permit opt outs. The Court addresses this issue below.

3. Legal Fees

The settlement provides for the distribution of $2.1 million in legal fees and expenses as set forth in Exhibit K to the Consent Decree. Defendant's counsel stated at [**32] the July 15, 1996 Fairness Hearing that the sum of $2.1 million was offered separately from the $ 3.8 million offer to settle the monetary claims of the class, The sum of $2.1 million includes reimbursement for expenses in excess of $650,000 actually incurred by the firms listed in Exhibit K of the Consent Decree. The balance of approximately $1.4 million represents compensation for the time spent by counsel and persons working at their direction.

The Washington Lawyers' Committee for Civil Rights & Urban Affairs, the law firms of Akin, Gump, Strauss, Hauer & Feld, L.L.P. and Walter & Haverfield devoted more than 30,000 hours to litigating and negotiating the settlement of this case. This reimbursement is considerably less than the rate provided under the guidelines established by *Laffey v. Northwest Airlines, Inc., 241 U.S. App. D.C 11, 746 F.2d 4 (D.C Cir. 1984),* which applies to the determination of legal fees in Title VII cases in the District of Columbia circuit.

Additional Findings

In addition to those findings of fact included above, the Court further finds as follows:

> [*236] -Upon consideration of the number and extent of negotiating sessions, the close [**33] involvement of Magistrate Judge Alan Kay, and the compromises reached on the specific settlement terms, the Court finds that the Consent Decree was the product of arm's length bargaining and that there was no evidence of collusion;

-Based upon the report of the Review Panel and testimony from the Review Panel at the Fairness Hearing, the Court finds that the Review Panel reached its decisions according to the guidelines and procedures set forth in the Consent Decree and that its decisions were fair and reasonable;

-The reform measures undertaken by the State Department together with the four year injunction against discrimination and the provisions enabling class counsel to monitor the State Department's progress in implementing the terms of the Consent Decree are fair, adequate and reasonable prospective relief measures; and

-The award of $2.1 million in legal fees and expenses is reasonable and justified in light of the duration of this case, the relief obtained for the class, and the fact that the amount of legal fees and expenses represents a compromise that is appropriate under the facts and circumstances of this settlement.

CONCLUSIONS OF LAW

Title [**34] VII of the Civil Rights Act of 1964, *42 U.S.C. §§2000e* et seq., as amended, prohibits discrimination in employment on the basis of race. Specifically, Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin..." *42 U.S.C. § 2000e-2(a)(l).*

Title VII also makes it unlawful for an employer to "limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. *42 U.S.C. § 2000e-2(a)(2).*

Certification of The Settlement Class

The parties have agreed that the Court, by approving the Consent Decree, shall be certifying a class of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree. [**35]

The practice of certifying a settlement class simultaneously with the approval of the pre-certification settlement is widely accepted. *Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157,* (S.D. Ohio 1992) ("tentative settlement can precede or be concurrent with class certification" (quoting *Clark Equipment Co. v. Allied Indus. Workers of America, 803 F2d 878, 881 (6th Cir. 1986))),- County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y 1989); In re Beef Industry Antitrust Litig., 607 F.2d 167, 173-78 (5th Cir. 1979), cert. denied, 452 US. 905 (1981); see also* Herbert Newberg & Alba Conte, Newberg on Class Actions § § 11.22, 11.27 (3d ed. 1992).

By granting the requested certification, the parties will be able to avoid protracted litigation and effectuate a settlement that will provide immediate and substantial benefits to the members of the class. Moreover, given the lengthy, active, arms length negotiations between the parties and the fairness of the settlement, there is no danger of abuse of the settlement class device in this case.

Federal Rule of Civil Procedure 23(a) explicitly sets forth four prerequisites to class certification: [**36] (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to me class; (3) the claims of the class representatives are typical of the claims of the class; and, (4) the class representatives will fairly and adequately protect the interests of the class. In addition to meeting the requirements of Rule 23(a), the proposed class must also satisfy one of the three subsections of Rule 23(b).

[*237] The Court's concludes that the class does meet the requirements of Rule 23(a) as follows:

Numerosity (Rule 23(a)(1)). This provision focuses on the practicality of joining all prospective class members in a single lawsuit. Where joinder is impractical, a suit may be maintained as a class action in the interest of judicial economy and to ensure access to the judicial system. *Deposit Guar. Natl Bank v. Roper, 445 U.S. 326, 339, 63 L. Ed. 2d 427, 100 S. Ct. 1166* (1980). Although Rule 23 requires no minimum number of class members, numerosity is generally satisfied by a proposed class of at least 40 members. *Committee of Blind Vendors v. District of Columbia, 695 F Supp. 1234, 1242 (D.D.C. 1988)* (63 class members satisfy numerosity [**37] requirement); *Sperling v. Donovan, 104 FR.D. 4, 7 (D.D. C. 1984)* (46 class members).

In this case, the known class consists of approximately 360 members, which includes more than 260 individuals actively employed by the State Department throughout the world. The Court concludes that the sheer number and wide dispersion of members of the proposed class renders joinder practically impossible.

Commonality (Rule 23(a)(2)). The requirement that a class action present common questions of law and fact is intended to ensure that every member of the proposed class

has been subject to the same discriminatory employment practices. *General Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15, 72 L. Ed. 2d 740, 102 S. Ct. 2364* (1982). Commonality requires proof that the treatment challenged as discriminatory was a "standard operating procedure -- the regular rather than the unusual practice ... statistical evidence, for example, may suffice if the disparities in treatment are significant." *Wagner v. Taylor, 266 U.S. App. D.C 4I4,836F.2d 578,592 (D.C Cir. 1987)* However, it is not necessary that each class member have suffered from the policy in precisely the same manner, only that [**38] the alleged discrimination stem from that same general policy. *See, e.g., Rossini v. Ogilvy & Mather, Inc. 798 F.2d 590, 59798 (2d Cir. 1986).*

To demonstrate that the claims of each class member involve common questions of law and fact, the plaintiff class introduced evidence to support their contention that statistically significant disparities existed in the rates at which white officers and black officers are tenured, terminated, assigned, and promoted. The Plaintiffs also asserted tat the existence of common questions of lam, and fact was established because the State Department's key personnel procedures are centrally administered, highly subjective, and applicable to all class members throughout their careers.

To support their assertion, Plaintiffs argue that a successful Foreign Service career depends on performance evaluations, which represent a supervisor's subjective assessment of performance. Plaintiffs assert that the evaluation procedures which applied during time periods relevant to this case did not provide objective standards to ensure that impermissible considerations, such as race, did not play a role in performance appraisals. Further, Plaintiffs argue that [**39] because promotions depend entirely on the comparative rankings determined by selection boards, one officer might have been promoted over another whose performance was indistinguishable from the first officer's but

identified as merely "outstanding" rather than "superlative" by that rating officer. Plaintiffs claim that the existence of common questions of law and fact was further demonstrated by the participation of 30 individuals as Plaintiffs in this lawsuits. The affidavits each filed with the First and Third Amended Complaints attest to how the State Department's policies affected his or her career and illustrated that the claims asserted are common to the class.

The State Department presented analyses disputing the existence of statistically significant disparities based on race and opposed Plaintiffs' contention of the existence of common questions of law and fact by noting that the Department's personnel system is highly decentralized.

Upon consideration of the entire record in this case, however, the Court finds that this case presents common questions of law and [*238] fact and satisfies the requirement of Rule 23(a)(2).

Typicality (Rule 23(a)(3)). The typicality requirement [**40] is to ensure that the class representatives have suffered injuries in the same general fashion as absent class members. *Wagner v. Taylor, 266 U.S. App. D.C 414, 836 F.2d 578, 591 (D.C Cir. 1987).* Because the elements of commonality and typicality tend to merge, *Falcon, 457 U.S. at 157 n.13,* where Plaintiffs establish commonality by proving class-wide harm caused by a subjective, centrally administered personnel system, typicality is satisfied by the same showing. *266 U.S. App. D.C at 159 n.15.* As with the requirement of commonality, the facts and claims of each class member do not have to be identical to support a finding of typicality. *Wagner, 836 F2d at 591.*

In this case, to demonstrate that the class representatives' claims are typical of the class claims, the Plaintiffs assert that class representatives Thomas, Williams, Fields and Marquis all experienced discrimination in assignments, having been assigned to less desirable posts than other career-enhancing positions for which they

qualified and bid. Plaintiffs Latimer, Marquis, Williams, and Fields claimed discrimination in tenuring, having experienced irregularities or delays in the tenuring process or having been terminated [**41] from the State Department for failure to obtain tenure. All of the class representatives claimed promotion discrimination, having been delayed or denied promotions they deserved. Finally, Plaintiffs Thomas, Williams, and Fields claimed they were terminated from me Sao Department for alleged poor performance or failure to receive tenure as a result of their performance.

The State Department contends that the class representatives did not present claims typical of the class because no single class representative suffered from all of the employment practices being challenged in the case and because the plaintiff intervenors, given the diversity of their individual allegations, did not meet the minimum criteria under the law for the creation of sub-classes.

Upon consideration of the entire record in this case, however, the Court finds that the experiences of the class representatives are typical of the Allegations in the class complaint and satisfy the requirements of Rule 23(a)(3).

Adequacy of Representation (Rule 23(a)(4)). The adequacy of representation requirement is to ensure that the rights of absent class members are represented vigorously by qualified counsel and by the [**42] class representatives. *National Assoc. for Mental Health v. Califano, 230 U.S. App. D.C. 394, 717 F.2d 1451, 1458 (D.C. Cir. 1983), cert. denied, 469 US. 817 (1984).* The Court finds that class counsel have the experience and competence to provide adequate representation to all class members. The Washington Lawyers' Committee has extensive experience including the litigation of more than twenty class actions such as *Kernan v. Holiday Universal, Inc. 1990 U.S. Dist. LEXIS 18097,* No. JH-90971 (D. Md. 1990); *McKenzie v. Kennickell, 684 F. Stipp. 1097 (D.D.C. 1988)* (Parker, J.); *Berger v. Ironworkers Local 201, 1995 US. Dist. LEXIS*

3521, No. 75-1743 (D.D.C.) (Penn, J.); and *Cook v. Billington, 1992 US. Dist. LEXIS 12519,* No. 82-0400 (D.D.C.) (Johnson, J.). Akin, Gump, Strauss, Hauer & Feld, L.L.P. is an international law firm with extensive experience in complex federal litigation, including individual and class EEO cases. Carl Anderson of Walter & Haverfield is the former legal counsel to the Governor of Ohio and has experience in a variety of civil rights issues.

In the present action, the predominantly equitable claims of the class arose from a system of personnel actions that have been uniformly imposed on all class members. Moreover, all the class representatives [**43] share the same commitment to assure that racial discrimination does not occur at the State Department and have vigorously prosecuted the claims raised in this lawsuit, even though in the context of settlement some of the class representatives may have differed with class counsel and with the class over the amount and distribution of damages. Ultimately, the adequacy of the named Plaintiffs' representation is determined by the terms of the settlement itself *In re Corrugated Container*

*Antitrust [*239] Litig., 643 F.2d 195, 212 (5th Cir. 1981);* 2 Herbert Newberg & Alba Conte, Newberg on Class Actions §§ 11.28, at 11-59 (3d ed. 1992) ("in the settlement context... the adequate representation requirement is satisfied when the court determines that the settlement was negotiated at arm's length and was not collusive in favoring the class representative").

The Court concludes that the settlement was clearly negotiated at arm's length and presents no danger of collusion. The following factors support this finding: (1) the size and complexity of the Consent Decree and the compromises reflected therein; (2) the context in which it was reached, that is, after more than nine years of litigation; [**44] (3) the fact that the settlement is the result of more than 30 months of often difficult negotiations between the

parties; (3) the fact that during negotiations class counsel met with class representatives and other class members on more than 125 occasions and held more than 1000 teleconferences regarding various aspects of the settlement; the Court's personal knowledge of the negotiators; and the intervention of Magistrate Judge Kay in the final and other stages of the negotiations. Thus, the Court finds that class counsel and the class representatives fairly and adequately protected the interests of the class.

In addition to meeting the prerequisites of Rule 23(a), the class must be properly categorized under Rule 23(b). In this case, Plaintiffs moved for certification under Rule 23(b)(2), which authorizes class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The Advisory Committee Notes to Rule 23 recognize that subdivision (b)(2) was intended for civil rights cases such as this one where "final [**451 relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Rules Advisory Committee Notes to 1966 Amendments to Rule 23. The parties also submit that certification under Rule 23(b)(2) is not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. *Probe v. State Teachers' Retirement System, 780 F.2d 776, 780 (9th Cir. 1986); Women's Committee for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N. Y 1976).*

The relief sought by the class, and secured by the terms of the Consent Decree, includes extensive injunctive and systemic relief in addition to monetary damages. The parties submit that, in cases where monetary relief is sought, certification under Rule 23(b)(2) is precluded only if the final relief sought relates 11exclusively or predominantly to

money damages." Rules Advisory Committee Notes to 1966 Amendments to Rule 23. Accordingly, the Court finds that the class in this case meets the requirements for certification under Rule 23(b)(2).

The Consent Decree and [**46] the Interests Of The Class

The Court has concluded that the approval of the Consent Decree is in the best interests of the class.

Federal Rule of Civil Procedure 23(e) imposes a duty on the Court to review all class action settlements in order to determine whether approval is warranted. Rule 23(e) provides in relevant part that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The requirements of Rule 23(e) are to "ensure that class actions are not settled or compromised to the undue detriment of others, normally absent class members who will be affected by the terms of the compromise." *Brooks v. State Bd of Elections, 848 F Supp. 1548, 1552 (S.D. Ga. 1994); Officers for Justice v. Civil Serv. Comn of San Francisco, 688 F. 2d 615, 624 (9th Cir. 1882)* (Rule 23(e) protects "class members, including the named Plaintiffs, whose rights may not have been given due regard by the negotiating parties"), *cert. denied, 459 U& 1217, 75 L. Ed. 2d 456, 103 S.Ct. 1219 (1983); Simer v. Rios, 661 F 2d 655, 665* [**47] *(7th Cir. 1981)* [*240 ("requiring notice to putative class members ... insures that [their] interests will be protected"), *cert. denied, 456 U.S. 917, 72 L. Ed. 2d 177, 102 S. Ct. 1773 (1982).*

In approving a proposed settlement agreement, the district court must determine that the agreement is "not the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a

whole is fair, reasonable and adequate to all concerned." *Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983); Leverso v. South Trust Bank of Ala., 18 F. 3d 1527, 1530 (11th Cir. 1994); Class Plaintiffs v. City of Seattle, 955 F.2d 1261 1291,* (9th *CQ* cert. denied, 506 *U.S. 943 (1992); Luevano v. Campbell, 93 F.R.D. 68, 8691 (D.D.C. 1981).*

The Court concludes that the settlement reached in this case is the product of extensive, non-collusive negotiations between the parties conducted through the most critical stages by Magistrate Judge Kay. There is no evidence of fraud or duress, as demonstrated by a number of factors, including the length and complexity of the Consent Decree, the compromises reflected therein, and the fact that the [**48] settlement occurred only after years of extensive discovery.

The Court's determination is guided by a variety of factors including: (1) the strength of Plaintiffs' case on the merits balanced against the amount offered in settlement; (2) the opinion of counsel on the fairness of the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the length, complexity, and expense of further litigation; (5) the reaction of class members to the proposed settlement and their opposition, if any, to the settlement terms. *Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir.), cert. denied, 512 U.S. 1220, 129 L. Ed. 2d 834, 114 S. Ct. 2707 (1993); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323-24 (2d Cir. 1990); Stoetzner v. United States Steel Corp., 897 F.2d 1 15, 118 (3d Cir. 1990); Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 US. 828, 74 L. Ed. 2d 65, 103 S. Ct. 63 (1982); League of Martin v. City of Milwaukee, 588 F. Supp. 1004 (E. D. Wis. 1984).*

Although the relative importance of any single factor depends on the circumstances of each case, balancing the strength [**49] of the plaintiffs case against the terms of the settlement is generally regarded as the most important. *Van*

Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988); Parker v. Anderson, 667 F.2d at 1209; Flinn v. FMC Corp., 528 F-2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 927 (1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974) ("If the settlement offer was grossly inadequate ... it can be inadequate only in light of the strength of the case presented by the Plaintiffs.").

The settlement provides broad prospective relief which the Plaintiffs could otherwise secure only by prevailing at trial on all issues. Under a realistic projection of potential litigation outcomes, it is unlikely that the class, if certified, would prevail on all issues. Thus, a more narrowly tailored injunction would be entered, and it is unlikely that class counsel would be able to monitor the impact of the reform measures on class members on which they did not prevail at trial. Although several prospective reform components in the Consent Decree also have been implemented pursuant to the settlement of the women's class action, *Palmer v. Christopher,* class counsel's [**50] ability to monitor those provisions is essential and can only be guaranteed through this settlement. The Court therefore determines that the certainty of prospective relief secured by the settlement, when compared to the uncertain outcome of litigation, is in the best interests of the class.

Prospective relief measures are as follows:

Promotions. The class will receive 17 immediate, new promotions. Plaintiffs' counsel presented arguments during settlement negotiations that demonstrated a maximum shortfall in the promotion of African-Americans in the range of 40-47. That analysis aggregated data across the mid-level grades and for all years covered by the lawsuit and counted as a promotion "event" the failure of a class member to be actually promoted from one grade to the next. Plaintiffs' [*241] counsel and experts had no statistically significant

evidence of promotion discrimination in the junior grades or the senior grades of the Foreign Service. In the senior grades there were too few class members to make statistical analysis meaningful.

The State Department disputes Plaintiffs' aggregation analysis and contends that, after controlling for appropriate variables, its maximum exposure [**51] was 10 "promotion events." According to the Department's statistical experts, a promotion event was a calendar year and, to the extent a shortfall existed, was properly remedied through monetary damages rather than actual promotion to the next grade. The Department asserts that Plaintiffs' analysis counted the same officer multiple times because promotion boards met annually and often promoted an officer upon subsequent review. Further, the Department contends that the shortfall of 10 applied only from grade 03 to grade 02, the only grade where a statistically significant shortfall even arguably existed.

In settlement, counsel for the parties agreed to 16 actual promotions for mid-level grade class members and one promotion within the Senior Foreign Service from grade OC to grade MC based upon analysis of the litigation risk that, if defendant's statistical model was found persuasive and Plaintiffs' model was rejected, Plaintiffs would obtain few, if any, actual promotions.

The Court determines the agreement to promote 17 class members to the next highest grade according to the procedures outlined in the Consent Decree to be fair, adequate, and reasonable.

Terminations/Reinstatements [**52] . Four class members who were separated for failure to achieve tenure will be reinstated into the Foreign Service as a result of the settlement. During negotiations, the parties disagreed over the accuracy of portions of the stipulated database pertaining to tenure and terminations of FSOs previously granted tenure. Class -counsel argued that all performance based

terminations should be aggregated for analytical purposes, including career candidates denied tenure and officers separated for alleged poor performance.

The State Department contends that separate analysis was required for tenure decisions and performance-based terminations of those officers who had previously received tenure. The State Department initially maintained that, after analyzing all post-1984 tenure decisions, there was no statistically significant disparity in the tenure rates of African-American career candidates. The Department reached the same conclusion for the performance-based separation of tenured officers. In addition, the Department asserted that an insufficient number of class members were denied tenure or separated for poor performance to certify a class on either issue, whether separated or combined [**531 for analysis. Accordingly, the Department refused to offer any reinstatements.

In light of the litigation risks presented by the parties' conflicting views on the correct data, the proper statistical methodology for analysis, and the likelihood of certifying this issue, the parties agreed to the reinstatement of 4 class members who failed to achieve tenure for limited five year appointments as Junior Officer Candidates, with the opportunity to obtain tenure.

The Court concludes that, because of the litigation risks, the agreement to reinstate 4 class members at the junior level according to the procedures outlined in the Consent Decree is fair, adequate and reasonable. Nonetheless, as the Court has mentioned on several occasions during the course of these deliberations and as it expressed in a letter to the Secretary of State, it would also be fair and appropriate for the Department to establish voluntarily some process for looking at the 15 or so individuals who now seek reinstatement but who were denied it because of the arbitrary limits of the settlement agreement. In the letter, the Court expressed its view as follows: "Because the settlement limits

the number of persons reinstated [**54] to four, it was my view that a safety-valve mechanism might be devised to assure that there would be no injustice to any individual because of the numbers limitation set forth in the settlement."

Monetary Relief. The class will receive a total of 3.8 million.

[*242] The Supreme Court's decision in *Landgraf v. US[Film Prods. 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d 229 (1994),* foreclosed retroactive application of certain provisions of the 1991 Civil Rights Act amendments, including the right to a jury trial and compensatory damages, to acts occurring before the effective date of the Act. Relying on *Landgraf, the* government took the position that prejudgment interest would not be available in this case. Accepting this position in consultation with their statistical experts, class counsel developed a projection of defendant's financial exposure on all damages issues in the range of S 2.5 to $ 4 million. That estimate was based on its experts' detailed promotion back pay calculations and analyses of the stipulated database, and it represented counsels' assessment of the most likely outcome of successful litigation.

Relying on analyses performed by its statistical experts, [**55] the State Department vigorously disputed Plaintiffs' damage estimates and calculated that its maximum damage exposure ranged from $ 725,000 to 1.5 million.

Evaluation of an appropriate monetary settlement required the parties to assess the litigation risks attached to the class certification, the competing experts' statistical analyses, and a showing as to each challenged employment practice.

If litigation had continued, relief to the class would have been delayed for several years. In the event that a class would be certified on all issues, the parties then would have

to complete a trial on the merits, a likely appeal by the losing party, and, then if successful, a follow-up individual "Teamsters hearings" on damages suffered by individual class members. *International Bhd. of Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977).* In the absence of a *right* to collect prejudgment interest, the Plaintiffs would need to recover a far greater monetary award in order to equal the amount to which the State Department ultimately agreed in settlement. In short, the Plaintiffs had to take into account the present value of money when comparing the State Department's [**56] final offer to the amount which could reasonably be recovered at the conclusion of protracted litigation. To justify continuing to litigate for five more years, class counsel projected that Plaintiffs would have to recover at least $ 5.6 million at that time to equal the present value of the $ 3.8 million settlement amount accepted by class counsel. The calculation of the time value of the $ 3.8 million monetary award projected over 3-5 years far exceeded Plaintiffs' most optimistic estimate of the likely monetary recovery on behalf of the class.

In light of those combined considerations, the Court does not dispute the statement that a $ 3.8 million monetary settlement was at the high end of projected litigation outcomes and represents a fair, adequate, and reasonable monetary award to the class.

As supported by the findings of fact in this case, the Court concludes that the classwide prospective and retroactive settlement terms constitute substantial relief which satisfies virtually all of the class's litigation objectives. Thus, protracted litigation is not likely to yield significant additional relief.

In addition to balancing the likely outcome of litigation against the settlement [**57] terms and considering the context in which the settlement was reached, the Court must consider the reaction of the class to the proposed agreement. In this case,

55 out of 359 class members, or 15 percent of the class, oppose final approval of the Consent Decree. Court approval of a class action settlement does not hinge exclusively on a vote by class members. In fact, under well established case law, a fair, reasonable, and adequate settlement will obtain court approval withstanding a significant number of objectors. *Grant v. Bethlehem Steel Corp., 823 F.2d 20. 23 (2d Cir. 1987); Isby v. Bayh, 75 F.3d 1191 (7th Cir. 1996)* (approval over objections of 13% of 200 member class); *EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884 (7th Cir. 1985)* (approval over objections of 15% of 253 member class), *cert. denied, 478 U.S. 1004 (1986); Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983)* (approval over objections by 23 of 27 named Plaintiffs and 15% of 1000 member class); *TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982)* (settlement approved despite objections of holders of 56% of outstanding shares); *[*243] Cotton v. Hinton, 559 F-2d 1326 [**58] (5th Cir. 1977)* (approval over objections of counsel claiming to represent almost 50% of class); *Bryan v. Pittsburgh Plate Glass Co, 494 IF12d 799* (3d Cir.), *cert. denied, 419 U.S. 900, 42 L. Ed. 2d 146, 95 S. Ct. 184 (1974)* (approval over objections of approximately 20% of 452 member class).

Further, class action settlement agreements do not require the assent of named Plaintiffs as a prerequisite to Court approval. *Flinn v. FMC Corp., 528 F.2d 1169, U 74 n. 19* (4th (70. 1971) ("Appellants do not argue, nor may they under the authorities, that assent of the class Plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable."); *Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1216 (5th Cir. 1978), cert. denied, 439 U.S. 1115, 59 L. Ed. 2d 74, 99 S. Ct. 1020 (1979)* ("To be sure, the assent of named Plaintiffs is not a prerequisite to court approval."); *Horton v. Merrill Lynch, 855 F Supp. 825 (E.D.N.C. 1994)* (approval over objections of majority of named Plaintiffs).

Even faced with vociferous objection to a proposed settlement, the court has a fiduciary responsibility to protect the interests of silent class members. [**59] *Grant v. Bethlehem Steel Corp., 823 F.2d 20, 23 (2d Cir. 1987).*

In this case, the vast majority of class members (85%) have not voiced any objection to the Consent Decree. That high percentage is certainly evidence that the settlement is not unfair or inadequate in the opinion of the class. Several objectors believed that one or two provisions of the settlement are unfair and asked the Court to disapprove the entire settlement on that basis or to direct counsel for the parties to revise the objectionable provisions.

Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled. After carefully considering the objections, the Court concludes that the Consent Decree as a whole is fair, reasonable, and adequate to the class. According, the Court will not deny final approval on the basis of those objections.

In addition to the specific factors which guide a court's review of a class action settlement, there is a strong public [**60] policy favoring settlement of litigation. The Supreme Court has emphasized the strong Congressional preference for encouraging voluntary settlements of Title VII actions. The Court has explained that "Congress enacted Title VII ... to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin ... cooperation and voluntary compliance were selected as the preferred .means for achieving this goal." *Alexander v. Gardner-Denver, 415 U.S. 36, 44, 39 L. Ed. 2d 14 7, 94 S. Ct. 1011 (1974).* Other courts also have recognized the importance of this policy. *See, e.g., Parker* **v.** *Anderson, 667 F.2d 1204, 1209* (5th Cir.) (approved

settlement will not be upset unless court clearly abused its discretion; limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement), *cert. denied, 459 U.S. 828, 74 L. Ed. 2d 65, 103 S. Ct. 63 (1982); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978)* (reconciliation and settlement are "preferred means for resolving employment discrimination disputes"), *cert. denied,* [**61] *439 US. 1115, 59 L. Ed. 2d 74, 99 S. Ct. 1020 (1979); In Re Domestic Air Transp. Antitrust Litigation, 148 F.R.D. 297 (N.D. Ga. 1993)* (in determining whether to approve class action settlement, the district court must be guided by strong judicial policy favoring settlement as well as the realization that compromise is the essence of settlement); *Hammon v. Barry, 752 F. Supp. 1087, 1100 (D.D.C. 1990)* ("well settled that, particularly in class action suits, there is an overriding public interest in favor of settlement"); *Ellis v. Naval Air Rework Facility, 87 F.R.D. 15, 18 (N.D.Cal. 1980)* ("cooperation and voluntary compliance are the preferred means for achieving the statutory goals of Title VIP).

[*244] Opting Out of the Settlement Agreement

Despite me many positive features of the proposed Consent Decree, the Court remains concerned by the number of dissenters. That concern relates to an issue that remains unresolved by the proposed Consent Decree, that of the right of class members to opt out of the proposed class settlement in order to retain the option to bring an individual lawsuit under Title VII. The Court concludes that allowing for "opting out" in this case [**62] would be the course of action most consistent with the purposes of the statute, and hereby grants those sixteen members of the class who have indicated the desire to opt out of this class settlement the right to do so.

But the Court will also allow those sixteen members additional time, until November 30, 1996, to reconsider their decision to opt out, and to rejoin the class settlement.

After November 30, 1996, however, any of the sixteen members who have not rejoined the class settlement can only gain relief by fully complying with all procedural requirements of Title VII and, if so satisfying those requirements, by bringing their own, separate, individual actions under Title VII. n2 They will receive no monetary benefits from the settlement.

> n2 The Court understands that three members of the plaintiff class who had previously asked to "opt out" of the proposed settlement have now asked to rejoin the settling class. The Court hereby grants their request.

Allowing for "opting out" is consistent with case law [**63] and the best interests of justice. It is clear that the Court has the authority to take this action. The authority of a court to approve a Consent Decree in this or any action brought under Title VII is derived from the statute itself and not the consent of the parties. *See Firefighters Local No. 1784 v. Stotts et. al., 467 US. 561, 576, 81 L. Ed. 2d 483, 104 S. Ct. 2576 (1984).* The court may modify any such decree to serve the purpose of the statute. Turner *v. Orr, 759 F.2d 817, 825 (11th Cir. 1985).* Particularly is this so in this case, where the parties have specifically presented the issue to the Court for resolution.

In *Pettway v. American Cast Iron Pipe Company, 576 F.2d 1157 (5th Cir. 1978),* the parties presented a consent decree for approval to the district court which arose from a settlement negotiated by the parties. The district court made substantial modifications to that consent decree and the court concluded that it must be certain that a settlement "does not unfairly impinge on the rights and interests of dissenters." *Id. at 1214. In Reynolds v. King, 790 F. Stipp. 1101, 1107 (M.D. Al. 1990),* the court rejected a settlement agreement in

a class action ["61 challenging the Alabama Highway Department's alleged employment discrimination and warned that a court must be careful to scrutinize whether, under a proposed settlement, the interests of certain class members are sold out.

But the most relevant precedent is *Holmes v. Continental Can Co., 706 F-2d 1144 (11th Cir. 1983).* In that case, the circuit court held that a district court had abused is dean by failing to allow opt out from a 23(b)(2) class that was facially unfair. In the decision, the court extensively discussed the applicability of opting out in a (b)(2) class action and concluded that when the damages stage of such actions take on the appearance of a (b)(3) action, a district court has discretionary power under rule 23(d) to allow "opt out" and design the procedures for such an action. *Id. at 1153-56.* It is appropriate to allow for "opt out" when the monetary relief stage of a particular Title VII lawsuit is functionally more similar to a (b)(3) class than to a (b)(2) class.

Here, Defendant argues that "opt out" should not be authorized in this (or, presumably, any) Rule 23(b)(2) class settlement. Defendant points to the long-standing concern that future defendants [**65] would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claim, and argues that the government did not bargain for a spate of individual claims following *settlement.*

However, the facts of this matter do not give weight to Defendant's theoretical concerns. Only 16 members have chosen to opt out of the settlement class. Some number of those opt outs may yet choose to opt back in [*245] to the class before November 30, 1996, as this Court has decreed; others, likely, may never bring or never be able to support an individual Title VII action. The Court has no reason to conclude with Defendant that those members of the dam who *would* "opt out" are, in fact, those members with the

strongest Title VII claims. What is more, if Defendant is right and those who want to opt out do have the strongest cases, what a grave injustice would then be done to those parties if this Court were to extinguish their individual rights.

The Court has been impressed with the vehemence with which some members of the class have opposed the settlement. It is quite clear that those members will believe themselves to have been "sold out" if this [**66] Court refuses to allow opt out of the settlement.

At the heart of this issue is the question of what distinguishes a (b)(2) class from a (b)(3) class. "At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness ... Injures remedied through (b)(2) actions are really group, as opposed to individual injuries." *706 F.2d at 1154.* The concern of this Court is that, in the absence of allowing for "opting out" some searing individual injury might be greatly under compensated. It would be terribly unfair to any African-American who may have been denied the opportunity to serve his country at the highest level of the diplomatic corps as a result of employment discrimination to be denied the opportunity to prove his or her individual claim. Justice demands that a defendant not be permitted to paper over any such injury if, in fact, it has occurred.

CONCLUSIONS

The Court wishes to congratulate the parties for performing admirably in resolving a complex and difficult matter. Counsel representing both Plaintiffs and the Defendant have performed in an exemplary fashion. In particular, the Court wishes to single out Magistrate Judge Alan Kay, who mediated the controversy, [**67] for his superb efforts. All participants who have worked so hard to resolve this matter should be proud of this settlement. The settlement, in conjunction with allowing for "opting out" by

those who elect to do so, provides an excellent framework for correcting and redressing employment discrimination at the Department of State.

That having been said, the Court does repeat its request that the Secretary of State voluntarily establish some process for looking at the 15 or so African-Americans who still seek reinstatement or some other action with respect to their individual cases. It is surely not in keeping with the spirit of the settlement and the expressed desires of a concerned Administration to deny reinstatement or some other form of action simply because of the admittedly arbitrary limitations of the settlement agreement. While the Court understands that there is some possibility that others within the Department might question the establishment of an ad hoc process, the ability to do so should not be insurmountable.

****The Court hereby finds the Consent Decree to be fair, reasonable and adequate under the circumstances. Further, with respect to the issue presented by the (**68] parties as to whether certain members of the class may "opt out" of the settlement, the decision of this Court is to grant them the right to do so. An appropriate order is attached hereto.

Date: 11/7/96 /s/Stanley Sporkin
United States District Judge

ORDER

Plaintiffs' case was originally brought in October 1986. On January 31, 1996, counsel for the plaintiff's class agreed to recommend a settlement to the approximately 360 putative class members. The terms of the settlement are embodied in a Consent Decree, which was signed by the parties on January 31, 1996, and then submitted to the Court for its approval. The Court held a preliminary hearing on the Consent Decree on March 13, 1996 and after hearing counsel and certain proponents and objectors granted preliminary approval of the Consent Decree on March 22, 1996. The Consent Decree and a court-approved notice, informing members of the class of their rights with respect to the Consent Decree, was then sent to all known members of the class. The Court subsequently held Fairness Hearings on July 15, 1996, July 22, 1996 and July 23, 1996 and had an additional hearing on September 19, 1996.

[*246] Upon consideration of the [**69] Consent Decree, the relief awarded therein, and all objections presented by affected class members, and for the reasons stated in the attached Memorandum Opinion, the Court hereby finds the Consent Decree to be fair, reasonable and adequate under the circumstances. By approving the Consent Decree, the Court hereby certifies a class of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and March 22, 1996 the date of Preliminary Approval of the Consent Decree.

The Court also finds that allowing for "opting out" by those sixteen members of the settlement class who still choose to do so is consistent with the best interests of justice. The Court allows those sixteen members additional time, until November 30, 1996, to reconsider their decision to opt out, and to rejoin the class settlement. Their failure to do so

shall preclude them from participating in or receiving any of the monetary benefits provided for by the settlement agreement.

The three members of the plaintiff class who had previously asked to "opt out" of the proposed settlement and have now [**70] asked to rejoin will be allowed to do so and it is so ordered; and it is further ORDERED that me Comes Decree be APPROVED, with the exceptions noted.

Date: 11/7/96 /s/Stanley Sporkin
United States District Judge

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Case No. 99ca1898

WALTER THOMAS :
1400 S. Joyce Street, #913 :
Arlington, Virginia 22202 :

ALAN B. C. LATIMER :
Douglas Street :
Port Moresby :
Papua, New Guinea :

MARY CYNTHIA SMOOT :
6601 Lansdale Street :
Forestville, Maryland 20747 :

ODIE FIELDS :
2500 Dickerson Road :
#102 :
Reno, Nevada 89503 :

ALFRED NEAL :
12 Grandview Drive :
South Yarmouth, Massachusetts 02664 :

Plaintiffs,

v.

AKIN, GUMO, STRAUSS, HAUER :
& FELD, L.L.C. :
Serve: Larry Hoffman, esq., :
Managing Partner :
1333 New Hampshire Avenue, N.W. :
Suite 400
Washington, D.C. 20036 :

and

WARREN E. CONNELLY, INDIVIDUALLY
Akin, Gump, Strauss, Hauer & Feld, L.L.C. :
1333 New Hampshire Avenue, NW :
Suite 400
Washington, D.C. 20036 :

WARREN E. CONNELLY, P.C. :
SERVE: David H. Eisenstat, P.C., R.A. :
1333 New Hampshire Avenue, NW :
Suite 400 :
Washington, D.C. 20036 :

and

CHARLES L. WARREN, INDIVIDUALLY:
Akin, Gump, Strauss, Hauer & Feld, L.L.C. :
1333 New Hampshire Avenue, NW :
Suite 400 :
Washington, D.C. 20036 :

CHARLES L. WARREN, P.C. :
SERVE: James C. Langdon, Jr., R.A. :
1333 New Hampshire Avenue, NW :
Suite 400 :
Washington, D.C. 20036 :

and

MICHAEL J. MADIGAN, INDIVIDUALLY :
Akin, Gump, Strauss, Hauer & Feld, L.L.C. :
1333 New Hampshire Avenue, NW :
Suite 400 :
Washington, D.C. 20036 :

MICHAEL J. MADIGAN, P.C. :
SERVE: James C. Langdon, Jr., R.A. :
1333 New Hampshire Avenue, NW :
Suite 400 :
Washington, D.C. 20036 :

and

JOSEPH M. SELLERS, INDIVIDUALLY :
The Washington Lawyers Committee for :
Civil Rights and Urban Affairs :
11 DuPont Circle, Suite 200 :
Washington, D.C. 20036 :

and

AVIS BUCHANAN, INDIVIDUALLY :
The Washington Lawyers Committee for :
Civil Rights and Urban Affairs :
11 DuPont Circle, Suite 200 :
Washington, D.C. 20036 :

Defendants.

Filed: March __, 1999

COMPLAINT FOR PROFESSIONAL NEGLIGENCE

The Plaintiffs, hereinafter collectively the "Plaintiffs" bring this legal malpractice action against Akin, Gump, Strauss, Hauer & Feld, L.L.C. (hereinafter "Akin, Gump), and the individually names attorneys and their respective professional corporations for professional negligence arising out of the legal representation of the Plaintiffs and state as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Walter J. Thomas (hereinafter "Thomas"), was the named Plaintiff in a lawsuit filed in the United States District Court for the District of Columbia in the matter of Walter J. Thomas, et al. v. George P. Shultz, C.A. No. 86-2850, an action for unlawful discriminatory employment practices.
2. Thomas is citizen of the Commonwealth of Virginia and regularly engages in business in the District of Columbia where his cause of action while employed by the U.S. Department of State arose, and where his claim for relief was filed.
3. Plaintiffs, Alan B.C. Latimer (hereinafter "Latimer"); Mary Cynthia Smoot (hereinafter "Smoot"); Odie Fields (hereinafter "Fields"); and Alfred Neal (hereinafter "Neal"), are citizens of the United States, were employed by the U.S. Department of State and were intervenor employees in the claim brought by Thomas for unlawful discriminatory employment practices arising out of their employment as foreign service officers with the U.S. Department of State.
4. All of the Plaintiffs were black American foreign service officers whose employment discrimination claims were filed pursuant to 42 U.S.C. §200E-16. The Plaintiffs' claims in the "underlying" cause of action alleged discrimination based on their race, including promotions, assignments, evaluation of performance, termination, selection out, alleging an environment permeated with hostile racial remarks, and retaliation.
5. Defendant, Akin Gump, is a law firm maintaining offices in the District of Columbia, whose firm members include the individual Defendants, Warren E. Connelly, Charles L. Warren and Michael J. Madigan and their respective professional corporations, all Defendants herein.

6. Defendants Joseph N. Sellers and Avis Buchanan, at all times stated herein, represented Plaintiffs in their claims for unlawful discriminatory employment practices in association with The Washington Lawyers Committee for Civil Rights and Urban Affairs.

7. All Defendants represented Plaintiffs in the furtherance of their causes of action which were brought in the United States Federal Court for the District of Columbia, and all legal services provided to Plaintiffs by Defendants were conducted in the District of Columbia where all Defendants are licensed to practice law and have maintained their offices throughout the course of the representation and to the present.

BACKGROUND FACTS

8. The Plaintiffs entered into a retainer agreement with the Defendants to represent Plaintiffs individually and as members of a punitive class in accordance with the terms of the retainer agreement between Walter J. Thomas and the Defendants herein related to the representation of Plaintiffs in Case No. CA.86-2850 in the United States District Court for the District of Columbia, in December of 1988, as set forth in Exhibit "A" attached hereto and incorporated hereby.

9. In accordance with the terms of the retainer agreement of December, 1998 (Exhibit "A") hereto, the parties agreed inter alia:

> "5. In the event there is any offer of settlement that would that would compromise and resolve all the plaintiffs' claims in Walter J. Thomas v. Shultz, C.A. No. 86-2850, the Client hereby agrees to abide by the wishes of the majority of the plaintiffs with respect to the acceptance or rejection of the settlement offer."

Each of the individual Plaintiffs herein had significant, viable, and provable claims of employment discrimination and retaliation which resulted in losses due to adverse discriminatory employment practices regarding their promotions, assignment, evaluation of performance, termination, and selection out due to the hostile racial environment they experienced with the U.S. Department of State as foreign service officers.

10. After the initial case was filed by Walter J. Thomas and others in 1986, the initial motion for class certification as denied and in 1988, twenty-eight (28) individuals were permitted to intervene in the action, including the other Plaintiffs herein.

11. On June 15, 1994, a motion seeking class certification, pursuant to Federal Rules of Civil Procedure 23(b)(2), or in the alternative 23(b)(3), was filed.

12. The parties engaged in discovery and entered into settlement negotiations until January 31, 1996, when the Defendants herein, as counsel for the individual Plaintiffs in the class notified the District Court that a proposed settlement had been reached.

13. Although the Plaintiffs herein were not fully informed as to the full scope and the details of the proposed settlement, prior to January 31, 1996, Walter J. Thomas, individual Plaintiffs herein and the other members of the uncertified class repeatedly made it clear to Defendants that by more than a majority vote, the Plaintiffs had rejected any compromise or settlement which would result in a certification of the class pursuant to Rule 23(b)(2), rather than 23(b)(3), which would allow the individual Plaintiffs to "opt-out" of the class in order to maintain their individual causes of action.

14. Contrary to the express instructions and wishes of the Plaintiffs herein and the other individual Plaintiffs in the underlying matter, the Defendants, and others, entered into secret discussions and negotiations which violated the rights of the individual Plaintiffs by entering into a consent decree which would certify the class, pursuant to 23(b)(2), which ultimately prohibited the individual Plaintiffs from being able to "opt-out" and thereby caused the Plaintiffs to lose their opportunity to pursue their individual claims and damages.

15. The proposed consent decree entered into by the Defendants herein, without the knowledge, approval and consent of the Plaintiffs, was in direct violation of the Plaintiffs specific instructions to the Defendants and violated their agreement with the Defendants, since the majority of the Plaintiffs, consisting of approximately 30 individual plaintiffs, had twice voted against the proposed settlement.

16. During the time period from January 1, 1996, through March 19, 1997, Plaintiff Thomas and the other Plaintiffs herein were never informed that their attorneys, the Defendants herein, had signed a written agreement with the attorneys for the U.S. Department of State in the underlying case on or about March 19, 1996, which is attached hereto and incorporated hereby as Exhibit "B".

17. The Plaintiffs herein first learned of the agreement of March 19, 1996, when it was received by their subsequent attorney, Barbara B. Hutchinson, on or about March 19, 1997, said agreement memorializing agreements made between the Defendants herein and the attorneys for the U.S. Department of States in C.A. No. 86-2850 (restyled Thomas v. Christopher).

18. The secret and undisclosed agreements between counsel of March1 9, 1996 (Exhibit "B"), and the consent decree which was filed with the United States District Court on or about March 19, 1996, was intentionally hidden from Plaintiffs; was in direct contravention of Plaintiffs' express instructions to Defendants; and resulted in Plaintiffs loss of their ability to prosecute their individual causes of action and recover damages far in excess of the amounts they will receive as monetary relief resulting from the Rule 23(b)(2) certification of the class encompassing all back foreign service officers employed from January 20, 1984, through March 22, 1996.

19. The District Court granted preliminary approval and scheduled fairness hearings for July 15, 1996. The District Court conducted fairness hearings on July 15, 1996, July 22, 1996, and July 23, 1996.

20. On November 7, 1996, the District Court granted approval for the proposed settlement agreement certifying a class pursuant to Rule 23(b)(2), in grating the right to sixteen (16) class members (including the Plaintiffs herein) to "opt-out" on the basis that the damages stage of the action was more akin to the Rule 23(b)(3) action and the individual rights might be unfairly extinguished without such right.

21. The U.S. Department of State appealed the Order of the District Court and the United States Court of Appeals for the District of Columbia issued an Order of March 27, 1998, affirming the District Court approval of the settlement agreement; reversing the District Court's ruling on the issue of the rights of the individuals to opt-out of the agreement; and ordering the agreement be binding on all individuals, including the Plaintiffs herein.

22. Subsequently, the Plaintiffs herein, and others, filed a Petition of Writ of Certiorari to the Supreme Court of the United States for further review; however, the Petition for Writ was not granted by the United States Supreme Court and the Plaintiffs herein are forever barred from pursuing their individual claims for redress and damages arising out of the unlawful discriminatory employment practices and related claims arising from their employment from the U.S. Department of State.

COUNT I
(Legal Malpractice/Walter J. Thomas)

23. Plaintiff, Walter J. Thomas, incorporates herein by reference paragraphs 1 through 22 as though fully set forth herein.

24. At all times relevant hereto, the Defendants held themselves out to Walter J. Thomas and to the public as attorneys knowledgeable in handling employment discrimination claims for individual damages and related class action claims as attorneys licensed in the District of Columbia and in the Federal Courts.

25. The Defendants owed to Thomas a reasonable duty to exercise that degree of care, skill and diligence in pursuing Thomas's claims related to the damages and valid causes of action he pursued for discrimination based upon his race in promotions, assignments, evaluation performance, termination, selection out arising out of an environment permeated with hostile racial remarks and for retaliation, all of which had been previous established and fully provable in his individual claim.

26. The Defendants failed to use that degree of care and skill that a reasonably competent attorney acting under similar circumstances would use by failing to abide by and follow Thomas's express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for him to "opt-out" of the class in order to receive his full measure of damages in his individual claim, rather than being prohibited from doing so as a result of the Rule 23(b)(2) class certification filed by Defendants.

27. The Defendants, as attorneys represented Plaintiff Thomas, had a fiduciary duty to represent Thomas with undivided loyalty and honesty.

28. The Defendants breached their fiduciary duty owed to Thomas by failing to perform their duties in accordance with the provision of their contract with Thomas (Retainer Agreement, Exhibit "A"), and failing to act in good faith by "selling out" and betraying Thomas and the other Plaintiffs herein when they entered into the secret agreement of March 19, 1996 (Exhibit "B"), and otherwise engaged in a pattern of deceit in violation of their duties owed to Thomas and the other Plaintiffs, thereby placing their own financial interest above the interest of their clients, the Plaintiffs herein.

29. The Defendant further breached their fiduciary duty to Plaintiffs by failing to disclose to them not only their true motives and conflict of interest resulting therefrom, but also in failing to advise them of the true nature of the posture they would take in consenting to a settlement with the U.S. Department of State which abrogated the rights of Plaintiffs, and by continuing to misinform the Plaintiffs regarding their true actions and motives.

30. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Walter J. Thomas, was caused to expend additional time, energy, attorneys' fees, costs, and expenses, in addition to time expenditure away from his normal activities, vocations and pursuits.

31. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Walter J. Thomas, has suffered monetary damages, economic loss, and will continue to suffer an sustain the damages for the loss of his causes of action, the damages and funds to be derived thereon, and interest thereon in the future.

WHEREFORE, the Plaintiff, Walter J. Thomas, demands judgment against the Defendants, Akin, Gump, Strauss, Hauer & Feld, L.L.C., Warren E. Connelly, Individually, Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually and Avis Buchanan, Individually, and each one of them, jointly and severally, in the amount of Five Million ($5,000,000.00) Dollars, plus interest, costs, and any other relief to which this Court finds him entitled.

COUNT II
(Legal Malpractice/Alan B. C. Latimer)

32. Plaintiff, Alan B. C. Latimer, incorporates herein by reference paragraphs 1 through 31 as though fully set forth herein.

33. At all times relevant hereto, the Defendants held themselves out to Alan B.C. Latimer, and to the public as attorneys knowledgeable in handling employment discrimination claims for individual damages and related class action claims as attorneys licensed in the District of Columbia and in the Federal Courts.

34. The Defendants owed to Latimore a reasonable duty to exercise that decree of care, skill and diligence in pursuing Latimer's claims related to the damages and valid causes of action he pursued for discrimination based upon his race in promotions, assignments, evaluation performance, termination, selection out arising out of an environment permeated with hostile racial remarks and for retaliation, all of which had been previously established and fully provable in his individual claim.

35. The Defendants failed to use that degree of care and skill that a reasonably competent attorney acting under similar circumstances would use by failing to abide by and follow Latimer's express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for him to "opt-out" of the class in order to receive his full measure of damages in his individual claim, rather than being prohibited from doing so as a result of the Rule 23(b)(2) class certification filed by Defendants.

36. The Defendants, as attorneys representing Plaintiff Latimore, had a fiduciary duty to represent Latimer with undivided loyalty and honesty.

37. The Defendants breached their fiduciary duty owed to Latimore by failing to perform their duties in accordance with the provision of their contract with Latimore (Retainer Agreement, exhibit "A"), and failing to act in good faith

38. The Defendants further breached their fiduciary duty to Plaintiffs by failing to disclose to them not only their true motives and conflict of interest resulting therefrom, but also in failing to advise them of the true nature of the posture they would take in consenting to a settlement with the U. S. Department of State which abrogated the rights of Plaintiffs, and by continuing to misinform the Plaintiffs regarding their true actions and motives.

39. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Alan B. C. Latimer, was caused to expend additional time, energy, attorneys' fees, costs, and expenses, in addition to time expenditure away from his normal activities, vocations and pursuits.

40. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Alan B. C. Latimer, has suffered monetary damages, economic loss, and will continue to suffer an sustain the damages for the loss of his causes of action, the damages and funds to be derived therefrom, and interest thereon in the future.

WHEREFORE, the Plaintiff, Alan B. C. Latimer, demands judgment against the Defendants, Akin, Gump, Strauss, Hauer & Feld, L.L.C., Warren E. Connelly, Individually,. Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually and Avis Buchanan, Individually, and each one of them, jointly and severally, in the amount of Five Million ($5,000,000.00) Dollars, plus interest, costs, and any other relief to which this Court finds him entitled.

COUNT III
(Legal Malpractice/Mary Cynthia Smoot)

41. Plaintiff Mary Cynthia Smoot, incorporates herein by reference paragraphs 1 through 40 as though fully set forth herein.

42. At all times relevant hereto, the Defendants held themselves out to Mary Cynthia Smoot, and to the public as attorneys knowledgeable in handling employment discrimination claims for individual damages and related class action claims as attorneys licensed in the District of Columbia and in the Federal Courts.

43. The Defendants owed to Smoot a reasonable duty to exercise that degree of care, skill and diligence in pursuing Smoot's claims related to the damages and valid causes of action she pursued for discrimination based upon her race in promotions, assignments, evaluation performance, termination, selection out arising out of an environment permeated with hostile racial remarks and for retaliation, all of which had been previously established and fully provable in her individual claim.

44. The Defendants failed to use that degree of care and skill that a reasonably competent attorney acting under similar circumstances would use by failing to abide by and follow Smoot's express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for her to "opt-out" of the class in order to receive her full measure of damages in her individual claim, rater than being prohibited from doing so as a result of the Rule 23(b) (2) class certification filed by Defendants.

45. The Defendants, as attorneys representing Plaintiff Smoot, had a fiduciary duty to represent Smoot with undivided loyalty and honesty.

46. The Defendants breached their fiduciary duty owed to Smoot by failing to perform their duties in accordance with the provision of their contract with Smoot (Retainer Agreement, Exhibit "A"), and failing to act in good faith by 'selling out" and betraying Smoot and the other Plaintiffs herein when they entered into the secret agreement of March 19, 1996 (Exhibit "B"), and otherwise engaged in a pattern of deceit in violation of their duties owed to Smoot and the other Plaintiffs, thereby placing their own financial interest above the interest of their clients, the Plaintiffs herein.

47. The Defendants further breached their fiduciary duty to Plaintiffs by failing to disclose -to them not only their true motives and conflict of interest resulting therefrom, but also in failing to advise them of the true nature of the posture they would take in consenting to a settlement with the U. S. Department of State which abrogated the rights of Plaintiffs, and by continuing to misinform the Plaintiffs regarding their true actions and motives.

48. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Mary Cynthia Smoot, was caused to expend additional time, energy, attorneys' fees, costs, and expenses, in addition to time expenditure away from her normal activities, vocations and pursuits.

49. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Mary Cynthia Smoot, has suffered monetary damages, economic loss, and will continue to suffer an sustain the damages for the loss of her causes of action, the damages. and funds to be derived therefrom, and interest thereon in the future.

WHEREFORE, the Plaintiff, Mary Cynthia Smoot, demands judgment against the Defendants, Akin, Gump, Strauss, Hauer & Feld, L.L.C., Warren E. Connelly, Individually, Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually and Avis Buchanan, Individually, and each one of them, jointly and severally, in the amount of Five Million ($5,000,000.00) Dollars, plus interest, costs, and any other relief to which this Court finds him entitled.

COUNT IV-
(Legal Malpractice/Odie-Fields)

50. Plaintiff, Odie Fields, incorporates herein by reference paragraphs 1 through 49 as though fully set forth herein.

51. At all times relevant hereto, the Defendants held themselves out to Odie Fields, and to the public as attorneys knowledgeable in handling employment discrimination claims for individual damages and related class action claims as attorneys licensed in the District of Columbia and in the Federal Courts.

52. The Defendants owed to Fields a reasonable duty to exercise that degree of care, skill and diligence in pursuing Fields' claims related to the damages and valid causes of action he pursued for discrimination based upon his race in promotions, assignments, evaluation performance, termination, selection out arising out of an environment permeated with hostile racial remarks and for retaliation, all of which had been previously established and fully provable in his individual claim.

53. The Defendants failed to use that degree of care and skill that a reasonably competent attorney acting under similar circumstances would use by failing to abide by and follow Fields' express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for him to "opt-out" of the class in order to receive his full measure of damages in his individual claim, rather than being prohibited from doing so as a result of the Rule 23(b) (2) class certification filed by Defendants.

54. The Defendants, as attorneys representing Plaintiff Fields, had a fiduciary duty to represent Fields with undivided loyalty and honesty.

55. The Defendants breached their fiduciary duty owed to Fields by failing to perform their duties in accordance with the provision of their contract with Fields (Retainer Agreement, Exhibit "A"), and failing to act in good faith by "selling out" and betraying Fields and the other Plaintiffs herein when they entered into the secret agreement of March 19, 1996 (Exhibit "B"), and otherwise engaged in a pattern of deceit in violation of their duties owed to Fields and the other Plaintiffs, thereby placing their own financial interest above the interest of their clients, the Plaintiffs herein.

56. The Defendants further breached their fiduciary duty to Plaintiffs by failing to disclose to them not only their true motives and conflict of interest resulting therefrom, but also in failing to advise them of the true nature of the posture they would take in consenting to a settlement wit@ the U. S. Department of State which abrogated the rights of Plaintiffs, and by continuing to misinform the Plaintiffs regarding their true actions and motives.

57. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Odie Fields, was caused to expend additional time, energy, attorneys' fees, costs, and expenses, in addition to time expenditure away from his normal activities, vocations and pursuits.

58. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Odie Fields, has suffered monetary damages, economic loss, and will continue to suffer an sustain the damages for the loss of his causes of action, the damages and funds to be derived therefrom, and interest thereon in the future.

WHEREFORE, the Plaintiff, Odie Fields, demands judgment against the Defendants, Akin, Gump, Strauss, Hauer & Feld, L.L.C., Warren E. Connelly, Individually, Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually and Avis]Buchanan, Individually, and each one of them, jointly and severally, in the amount of Five Million ($5,000,000.00) Dollars, plus interest, costs, and any other relief to which this Court Ends him entitled.

COUNT V
(Legal Malpractice/Alfred Neal)

59. Plaintiff, Alfred Neal, incorporates herein by reference paragraphs 1 through 58 as though fully set forth herein.

60. At all times relevant hereto, the Defendants held themselves out to Alfred Neal, and to the public as attorneys knowledgeable in handling employment discrimination claims for A individual damages and related class action claims as attorneys licensed in the District of Columbia and in the Federal Courts. The Defendants owed to Neal a reasonable duty to exercise that degree of care, skill and diligence in pursuing Neal's claims related to the damages and valid causes of action he pursued for discrimination based upon his race in promotions, assignments, evaluation performance, termination, selection out arising out of an environment permeated with hostile racial remarks and for retaliation, all of which had been previously established and fully provable in his individual claim.

61. The Defendants owed to Neal a reasonable duty to exercise that degree of care, skill and diligence in pursuing Neal's claims related to the damages and valid causes of action he pursued for discrimination based upon his race in promotions, assignments, evaluation performance, termination, selection out arising out of an environment permeated with hostile racial remarks and for retaliation, all of which had been previously established and fully provable in his individual claim.

62. The Defendants failed to use that degree of care and skill that a reasonably competent attorney acting under similar circumstances would use by failing to abide by and follow Neal's express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for him to "opt-out" of the class in order to receive his full measure of damages in his individual claim, rather than being prohibited from doing so as a result of the Rule 23(b) (2) class certification filed by Defendants.

63. The Defendants, as attorneys representing Plaintiff Neal, had a fiduciary duty to represent Neal with undivided loyalty and honesty.

64. The Defendants breached their fiduciary duty owed to Neal by failing to perform their duties in accordance with the provision of their contract with Neal (Retainer Agreement, Exhibit "A"), and failing to act in good faith by "selling out" and betraying Neal and the other Plaintiffs herein when they entered into the secret agreement of March 19, 1996 (Exhibit "B"), and otherwise engaged in a pattern of deceit in violation of their duties owed to Neal and the other Plaintiffs, thereby placing their own financial interest above the interest of their clients, the Plaintiffs herein. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Alfred Neal, was caused to expend additional time, energy, attorneys' fees, costs, and expenses, in addition to time expenditure away from his normal activities, vocations and pursuits.

65. The Defendants further breached their fiduciary duty to Plaintiffs by failing to disclose to them not only their true motives and conflict of interest resulting therefrom, but also in failing to advise them of the true nature of the posture they would take in consenting to a settlement with the U. S. Department of State which abrogated the rights of Plaintiffs, and by continuing to misinform the Plaintiffs regarding their true actions and motives.

66. As a direct and proximate result of the Defendants' negligent breach of duties, as described above, the Plaintiff, Alfred Neal, has suffered monetary damages, economic loss, and will continue to suffer an sustain the damages for the loss of his causes of action, the damages and funds to be derived therefrom, and interest thereon in the future.

WHEREFORE, the Plaintiff, Alfred Neal, demands judgment against the Defendants, Akin, Gump, Strauss, Hauer & Feld, L.L.C., Warren E. Connelly, Individually, Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually and Avis Buchanan, Individually, and each one of them, jointly and severally, in the amount of Five Million ($5,000,000.00) Dollars, plus interest, costs, and any other relief to which this Court finds him entitled.

Date:

Respectfully submitted,
/s/Walter Thomas
1400 S. Joyce Street, #913
Arlington, Virginia 22202
(703) 521-1067
Pro Se Plaintiff

/s/Alan B. C. Latimer
Douglas Street, Port Moresby
Papua, New Guinea
(675) 321-1455
Pro Se Plaintiff

/s/Mary Cynthia Smoot
6601 Lansdale Street
Forestville, Maryland 20747
301-736-6973
Pro Se Plaintiff

/s/Odie Fields
2500 Dickerson Road
#102
Reno, Nevada 89503
775-329-4393
Pro Se Plaintiff

/s/Alfred Neal
12 Grandview Drive
South Yarmouth,
Massachusetts 02664
508-394-6838
Pro Se Plaintiff

RETAINER AGREEMENT

This Agreement represents the understanding between the Washington Lawyers' Committee for Civil Rights under Law (hereinafter "the Committee"), Akin, Gump. Strauss. Hauer & Feld (hereinafter "the Firm") and Walter J. Thomas (hereinafter "the Client") with respect to the provision of legal services.

1. The Client hereby retains the Committee and the Firm to provide representation in:

> the United States District Court for the District of Columbia, in the matter of Walter J. Thomas, et al. v. George P. Shultz, C.A. No. 86-2850, an action for unlawful discriminatory employment practices.

2. It is understood that the Committee's and the Firm's Representation is limited to the matters or proceedings described in paragraph 1 above, and representation of the Client in any other matter or proceeding must be the subject of a new retainer agreement. The Firm shall act as lead counsel in consultation with co-counsel, the Committee and Kalijarvi and Chuzi.
3. In the event relief is obtained in this proceeding all parties hereto agree that the Committee and the Firm are entitled to reasonable compensation for attorneys' fees and reimbursement for costs and disbursements, and that the Committee and the Firm will ask the court or administrative agency to award such reasonable compensation and reimbursements, including a fee enhancement if appropriate.

4. If the Client receives a monetary award through a settlement which does not expressly and separately provide for attorneys' fees and cannot afford to pay attorneys' fees except from the award itself, the Committee and the Firm agree to accept as attorneys' fees, cost and disbursements a maximum amount of one-third of the monetary award even though reasonable compensation of those charges may exceed that amount, This provision is intended to provide the Committee and the Firm with partial, compensation in cases involving clients with means insufficient to afford the cost of the litigation. The Client hereby authorizes the Committee or the Firm to withhold from-any award recovered in connection with this representation the amount equal to any unreimbursed disbursements or costs; subject to paragraph 3 above,

5. In the event there is any offer of settlement that would compromise and resolve all the plaintiffs' claims in Walter J, Thomas v, Shultz, C,A, No. 86-2850, the Client hereby agrees to abide by the wishes of the majority of the plaintiffs with respect to the acceptance or rejection of the settlement offer.

6. The Client understands that the Committee is a nonprofit organization seeking to further the cause of equal justice under law, and that the Committee and the Firm have agreed to provide legal representation in this matter because they believe, on the, basis of the facts now known, that the claim(s) raise(s) important civil rights issues affecting both the Client's and other persons protected by the civil rights laws. The Client further understands that if the Committee and/or the Firm determine an the basis of newly discovered facts or changed circumstances that in their professional legal judgment the claim(s) in this proceeding should be dismissed, settled or otherwise disposed of, and if the Client will not consent to such settlement, dismissal or

disposition, the Committee and/or the Firm reserve the right to withdraw from further representation in connection with this claim. In that event, the Committee agrees to assist in locating replacement counsel.

7. The Client has carefully read over and fully understands the above and requests the services and assistance described herein.

8. The client acknowledges and understands that any lawsuit is inherently uncertain, and that the Client may recover only nominal damages or no money at all in this case,

9. Any and all oral representations are merged into this written document. *Any* subsequent modification or alteration to this Agreement shall only be effective if it is in writing and signed by the Firm, the Committee and the Client.

AGREED TO:

_____

WASHINGTON LAWYER'S COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
By: /s/Joseph M. Sellers
Date: 12/12/88

AKIN, GUMP, STRAUSS,
HAUER & FELD
By: /s/Leslie M.
Date: 12/12/88

KALIJARVIE AND CHUZI
By: /s/ Greg Chuzi
Date: 12/13/88
By: /s/ Walter J. Thomas
Date: 12/14/88

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No.CA 86-2850

WALTER THOMAS,	:	
	:	
Plaintiff	:	
vs.	:	**Washington, D.C.**
	:	**March 20, 1996**
JAMES BAKER,	:	**9:25 a.m.**
	:	
Defendant:		
. . . . .	:	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE.

Filed: March 20, 1996

APPEARANCES:

For the Plaintiff: Aiken, Gump, Strauss, Hauer
& Feld, L.L.P.
By: WARREN CONNELLY, ESQ.
MICHAEL MADIGAN, ESQ.
RICHARD P. SCHLEGEL, ESQ.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036

BARBARA B. HUTCHINSON, ESQ.
7907 Powhatan Street
New Carrollton, Maryland 20784

For the Defendant: JOHN BIRCH, ESQ.
MELINDA CHANDLER, ESQ.
Assistant U.S. Attorney
555 Fourth Street, N.W.
Washington, D.C. 20004

Court Reporter: BEVERLY J. BYRNE
Official Court Reporter
Room 6812 U.S. Courthouse
Washington, D.C. 20001
(202) 273-0899

Proceedings reported by stenomask, transcript produced from dictation.

THE DEPUTY CLERK: Civil Action 86-2850, Walter Thomas versus James Baker. Counsel, would you please state your names and who you represent for the record?

MR. MADIGAN: Michael Madigan on behalf of the plaintiff class. Good morning, Your Honor.

THE COURT: Good morning.

MR. MADIGAN: I'm here together with Mr. Connelly, Mr. Anderson and Mr. Sellers. We're all representing the plaintiff class.

THE COURT: All right. I think the way we'll begin - - I read the papers, and I can't say I understand everything, but it's obvious that a lot of hard work went into this thing. It's obvious that whatever people say about lawyers and class actions, it doesn't apply to this case. This is a case that started in 1988, '86?

MR. MADIGAN: '86, Your Honor. It's almost a decade old at this point.

THE COURT: Boy. All right. Now, and so there is a lot of good work in it. A lot of people will benefit. I have some questions, but I don't know if you want to just summarize what you've done. If you want me to give you my two big questions, I could do it so you work it in. Would that help you? I only have two really major questions.

MR. MADIGAN: Yeah, that would help, Your Honor. We have a brief presentation that would summarize it for the Court, but perhaps if the Court - -

THE COURT: Yes, I'll give you the questions and then you can work it in. Question No. 1 is what happens if an individual who might have a very strong claim that's in this class, but would like to present that case by themselves? In other words, they don't want to be a party to the class action.

And, two, the second question which is really similar to that one is can anybody opt out of this? Those are the two that I see are key here. All right, I'll let you go. Go ahead.

MR. MADIGAN: What we had hoped to do this morning, Your Honor, is to just describe briefly for the Court the terms of the agreement, which Mr. Connelly will do. Mr. Sellers, who as Your Honor knows, is with the Washington Lawyers' Committee, will present the tactical considerations that led us to recommend the settlement and perhaps could respond to Your Honor's two questions that are before the Court.

THE COURT: Right.

MR. MADIGAN: Under the case law, the process before this Court to determine whether to preliminarily approve the settlement is a two step process. And today under the case law is the first step. And that step is to make a preliminary determination of whether the remaining 300 members of the class should have the opportunity to review the document carefully and whether there should be a full scale fairness hearing.

The Courts have held in the various Circuits that it's really a probable cause standard as to whether it's probable cause to give them the document and hold a full hearing. Counsel believes that that standard has been met and that the Court should go forward to the second stage which would be a consideration of the fairness at the fairness hearing, and that's not a consideration today.

Mr. Connelly will describe the terms and conditions briefly for the Court. And as I said, Mr. Sellers will give the answers to those questions and respond to the tactical considerations. As Your Honor knows, Ms. Hutchinson and Ms. Watson are both here representing members of the plaintiff group that are objecting to the agreement. There are a number of individuals in the courtroom who are in favor of the agreement who are class members and plaintiffs and are available if the Court should desire to hear from them.

So with that, I'll let Mr. Connelly describe the agreement, Your Honor.

MR. CONNELLY: Your Honor, I'm Warren Connelly with the law firm of Akin, Gump, Strauss, Hauer & Feld. We realize the Court's time is limited, so I won't go through what is obviously a very complicated and detailed agreement.

I want to just make a point at the outset. When this lawsuit started, it was a class action. There were individual plaintiffs, but the point was essential from the very start that the major objective of this case was to change the system at the State Department. We wanted - - the plaintiffs and counsel wanted fundamental reform of the State Department on an ongoing prospective basis. That was Objective 1.

Objective 2 was to get meaningful relief for the individuals who have been discriminated against. We think we've done that in this agreement. We think that every current and former Foreign Service officer is going to get meaningful relief as a result of this settlement.

Now, let me just outline why. This agreement has three basic components. It has a four year injunction. And this injunction prohibits race discrimination in virtually every employment practice that is covered by our complaint. Selections out, tenuring, assignments, training, promotions, evaluations. It's the heart of the State Department personnel system.

THE COURT: How is that going to be implemented? How is it going to be monitored? I read your papers. Is there going to be an ongoing monitoring system? Or is it going to be on an ad hoc basis?

MR. CONNELLY: Your Honor, we regard the monitoring as critical to enforcing the injunction. So we insisted on monitoring to accompany the injunction. We are going to get on an annual basis issue by issue reports, statistical reports. And we're going to have our statistical experts analyze those reports. We're going to be actively involved in overseeing this injunction. This is not something no auto pilot.

THE COURT: Would there be a hot line kind of thing as a part of it?

MR. CONNELLY: We have a provision in the agreement, Your Honor, where we - - if we see something that we don't like, that triggers an obligation to get in touch with government counsel to find out what's going on, to get a further factual investigation, and then written certification of a disagreement, and then we'll come back to the Court.

THE COURT: No, I'm not worried about the Court. What I'm worried about is suppose an individual feels that the agreement is being breached. Can they bring that to someone's attention who will then set in motion these other things?

MR. CONNELLY: That's exactly right, Your Honor. We actually had a meeting over at the State Department with about 40 African-American Foreign Service officers and this question was asked yesterday, and we said we want to know immediately. If you see something going wrong, let us know. We'll get on it right away.

THE COURT: All right.

MR. CONNELLY: Okay. So that's point one, the injunction. Point two, the prospective relief. We've got meaningful changes, specific changes in the evaluation system which is at the heart of what goes on down there. The evaluation form is going to be looked at by an independent expert with active participation of us, the plaintiffs' counsel. They've got to share what they're doing with us. Regular meetings are provided for. That form is going to be changed to reflect an evaluation of the knowledge, skills and ability that are required to perform the jobs down there.

We've got a senior level council set up that has to have an African-American on it at all times. That itself is going to conduct its own monitoring program as requiring regular reports from every bureau in the State Department, statistical reports.

We've got a comprehensive enhanced training program for every manager in the Department on diversity and equal employment opportunity. That's in operation already. We reformed the honor award system. And before we even discussed or agreed to any of these prospective reforms, we went out at Mr. Anderson's recommendation, and we retained a nationally recognized expert in affirmative action and contract compliance. His name is Carey Kirkland. And we had him look at every one of these issues. And before we agreed to any of them, he opined that in his opinion it would do the job.

Now, I don't want to say it's gong to work in practice, but the way - - because, you know, the proof is in the pudding. But it's set up in a way that he thought was acceptable. And let me just say that we never heard an objection from the plaintiffs, any of them, about the prospective relief or the injunctive relief.

So the third piece is what we're left with, and that's the retroactive relief, the damages and the promotions. We got $3.8 million for the class. We've got 17 promotions and four reinstatements. We've got some fairly complicated mechanisms, and we've got an impartial panel. Either one of these mechanisms is going to be used to distribute the relief among the members of the class.

But the point is that they are all set up in a way to distribute it fairly among all the members of the plaintiffs, plaintiffs and non-plaintiffs. No segment of the class is going to get a disproportionate amount of relief.

THE COURT: Now, what were the other two? There was reinstatement, and what was the other?

MR. CONNELLY: There are three basic categories, Your Honor. There is the $3.8 million for the class, and we've divided that up into different pools, the 3.8.

THE COURT: I know the formula. Go ahead.

MR. CONNELLY: Seventeen - -

THE COURT: Wait. Three pools?

MR. CONNELLY: $3.8 million.

THE COURT: Three pools?

MR. CONNELLY: Three pools.

THE COURT: Okay. What's the next one?

MR. CONNELLY: Seventeen promotions.

THE COURT: Seventeen promotions.

MR. CONNELLY: In the mid level of the Foreign Service. And four reinstatements of people who were denied tenure.

THE COURT: All right. Now, what does that mean? Does that mean that you've identified these people or does that mean no that's the limit that is available? In other words, if you say 17 promotions, suppose there are 20 people that are entitled to them. Only 17 get them?

MR. CONNELLY: Yes, Your Honor, and here is how it works. Seventeen is the limit on promotions. Now there are a lot of people who would say they should get those promotions, who feel like they were passed over unfairly. So we had to design a way to pick 17.

And the way we've designed it is the people - - and we don't know who those individuals are, but the mechanism will give those promotions to the people who have waited the longest for a promotion and who have not yet been promoted. You know, we could have done it a lot of different ways, it just seemed to us that that was a fair way of doing it.

THE COURT: And how about the reinstatements?

MR. CONNELLY: All right. The reinstatements, there are 12 people who are the universe of those class members who were denied tenure. Four of those will be reinstated. We don't know how many of those 12 even want to be reinstated. Some of them have careers now. They've gone on and they've started new careers. We know they have no interest in coming back. Others may. We have an impartial three member panel that's going to take the applications. We have criteria established. The panel will apply the criteria to the applications they receive.

So if there are four spots open, and they get six applications, the four most deserving are going to be reinstated.

THE COURT: Why - - well, you have only a small group there. Why can't you have this subjective group give it to whatever people deserve it? Why limit it?

MR. CONNELLY: Well, Your Honor, the four reinstatements was a negotiated number with the State Department. That was a negotiation where we would have liked more, and they would have liked less.

THE COURT: Well, you know, it's not going to be more than 12, right?

MR. CONNELLY: The universe of people potentially eligible for reinstatement is 12.

THE COURT: And you know it's going to be less than that.

MR. CONNELLY: We know it's going to be less than that.

THE COURT: You know, well, on the promotions, what's your universe there? Do you have any idea?

MR. CONNELLY: I do not know the actual number, Your Honor. Well, I would say it's going to be at least 50.

THE COURT: Fifty, and you cut it down to 17?

MR. CONNELLY: That was a negotiated number, too.

THE COURT: I got you. All right.

MR. CONNELLY: Okay, now let me just briefly go over the process that led us to each of these three elements of the agreement. First of all, I think - - Akin Gump got involved in this case in 1988, two years after it started. We took over from a small law firm that really didn't have the resources to handle this case. I think it's fair to say we were in trench warfare in discovery with the government for about five years.

THE COURT: And that's a good law firm. They're experts in this- -

MR. CONNELLY: They're good. But they weren't simply capable of taking production of 50,000 documents and taking innumerable depositions. More importantly - -

THE COURT: There is one thing that's clear. The amount of money that's going for the attorneys' fees is very, very reasonable. Believe me. You don't have to prove that one.

MR. CONNELLY: Thank you, Your Honor. I appreciate that.

THE COURT: I read that. I mean, the hours that were put in I don't even know what the rate would be, but I think it's less than 50 bucks an hour; isn't' it?

MR. CONNELLY: Well, Your Honor, you know, we are not in this for the money. We are in it for the class.

THE COURT: It's very low. So I don't think any one is gong to complain on that. If they do, let them complain, but I think that's one it's obvious that the work has been done. Go ahead.

MR. CONNELLY: Well, we got 93 computer tapes from the State Department, and we got 1,000 pages of written explanations. This was a massive undertaking to analyze it. We spent $600,000 on a computer expert to help us with that. That was a major part of our analyses that led us to the litigation risk analyses that we made.

Now, when we were here before Your Honor on January 31 of this year, the statement was made that class counsel hadn't communicated with the plaintiffs in the class. So we went back to our records, and we looked just at the time period of settlement discussions, which began in September - - excuse me, April of '93, and we determined from our time records that we have had over 120 meetings with the plaintiffs and over 1,000 telephone conversations about settlement. So we really reject the notion that we didn't communicate with them about this process.

And not only did we communicate with them orally, we gave them these detailed litigation risk analyses at every step of the way. We even flew in our computer consultants, because that was complicated enough, and had a meeting just between us, the consultants and the plaintiffs to go through that.

We did additional analyses that we didn't think were necessary, but the plaintiffs wanted us to do anyway, and our computer consultants did that.

And last, and I think by no means least, Your Honor suggested that we get Magistrate Kay involved, and I don't think we could have settled this case without his assistance.

THE COURT: He's terrific.

MR. CONNELLY: He's terrific, and I think he is also, as a result of the numerous meetings we had with him, very familiar with the complexities of this case, and how we got to where we are.

So, to sum it up, Your Honor, on the retroactive relief, the money, the promotions, the reinstatements, is an outcome that all of our analyses tell us is at the high end of what we could have expected to get if we litigated. And we expected litigation in this case, assuming there would be appeals, and we know there are going to be appeals by the losing side, to go another five years at least. So we factored that in, too.

With respect to the prospective relief, we got what we wanted. With respect to the injunction, we got what we wanted. So we don't think the objections, and we know there are plaintiffs with objections, are really well taken. We think they can fairly be characterized as objections to the amount of individual relief that they each think they may get compared to what they think they're entitled to.

And Mr. Thomas is probably as good an example as any. I mean, Mr. Thomas at one point in this negotiation wanted $750,000 for himself. More recently his lawyer has said he'd be willing to take $650,000.

MS. HUTCHINSON: I object to him speaking about anything we had discussion on in terms of - -

THE COURT: I think you're correct. I think you're right. All right.

MR. CONNELLY: That's fine, Your Honor. The point is that the plaintiffs are not entitled to disproportionate relief compared to other members of the class. We've designed the settlement in such a way that everybody's claims are going to be evaluated one by one without regard to whether they are plaintiffs or not, and the mechanisms we designed, we think are what's required under Rule 23, and we think we've fulfilled our obligations. Thank you.

THE COURT: Okay. Thank you.

MR. SELLERS: Good morning, Your Honor. Joseph Sellers. Before I begin my brief remarks, I'm sure the Court is aware that along with myself and others at the counsel table is Richard Schlegel from Akin Gump and Avis Buchanan from the Washington Lawyers' Committee. I just wanted their presence to be noted for the record.

Your Honor, before I get to the remarks I'd prepared, let me address the questions the Court asked.

THE COURT: Right.

MR. SELLERS: We have agreed, the parties have agreed as to the issue of the right to opt out of a Rule 23(b)(2) class, which is the grounds on which this class would be certified. But the agreement is silent as to that issue. That is the parties could not agree as to whether it was a right that was available and that, therefore, the agreement is silent as to that.

The issue, however, is on appeal in this circuit in a case of Cook against Billington from a decision by Judge Johnson who denied a request for leave to opt out, and that matter is I think already been briefed or is shortly going to be briefed, and I think is scheduled for argument later this year.

As to the plaintiffs, the position of counsel for the class on this, we have agreed not to take a position. So I leave the actual address of the merits as to whether there is a right to opt out to any counsel - -

THE COURT: Why would - - how would that - - why would that adversely affect your - - this settlement here if someone wanted to opt out? You would reduce the - - all the things would be proportionately reduced. If someone wants to bring their own claim, you know, it's a heck of a thing to bring a claim. The work that you people have done, and they're going to have to have a strong basis for bringing it.

MR. SELLERS: Right. Your Honor, let me be - -

THE COURT: I'll tell you that would go a long way in my mind to say that anybody that wants to opt out, and I think that would bring this - - I think that this would, you know, handle the whole matter. It's that simple. It's the key it seems to me to this whole case.

MR. SELLERS: Your Honor, counsel for the class are not - -

THE COURT: Would the government really be objecting to that, allowing someone to opt out if they wanted to?

MR. BIRCH: I'd like to address that when I make my remarks.

THE COURT: Okay. Go ahead. Well, let's go on.

MR. SELLERS: Let me just make clear that although we don't take a position as to whether such a right exists in this Circuit, we're not opposed to it, and we have not been opposed to it. I think the matter is more properly addressed to Mr. Birch and to any of the counsel for the individual plaintiffs who are here today.

With that, I'll turn now to my other remarks, unless the Court has other questions on this.

THE COURT: Go ahead.

MR. SELLERS: Your Honor, as I think our papers make clear, the inquiry at this stage is a relatively limited one.

THE COURT: I think I understand that.

MR. SELLERS: Okay. In advising our clients as to what their options were during the course of the negotiations, and in making our own assessments, we are obviously guided by the alternatives to settlement, which would be proceeding with litigation. And I think it's fair to say that when assessed in the context of the risks of litigation, further litigation, and the delay in recovery, we think the settlement is particularly noteworthy and beneficial to the class as a whole.

Among the risks that we recognize without conceding that any of them are meritorious, but we recognize as the Court is aware, this case has twice before had requests for class certification denied by Judge Revercomb. And while we have every reason to believe that if we had to go forward, we could persuade the Court that certification was warranted, we also recognize there are good arguments to the contrary. Without certification, of course, we would have a group of 30 plaintiffs and no more.

THE COURT: Well, it seems to me that to the extent there will be individual objections, that will go against the concept of class action. I mean, it works against it, it seems to me. Am I right?

MR. SELLERS: Well, Your Honor, I think that we have to appreciate that this class number is somewhere in the range of 350 members. And while there are undoubtedly some here today who feel very strongly and very genuinely that the settlement is not a good one, our impression is that the overwhelming majority are supportive of the agreement.

THE COURT: Well, I understand that. But what I'm saying is the extent to which people object goes a long way in saying they're undermining their own bases for saying it's a class action.

MR. SELLERS: Well, to the extent that they think that their interests sharply divert from each other, the Court may be correct, but I'd wait and see whether that is, in fact, the position. As the Court is aware, I think there is no disagreement as to the value of the injunctive relief.

In addition to the risks not getting the class certified at all, we, of course, have risks associated with getting it certified only in pieces. And without going into the details of that, there were in our view significant risks that some portion of the class might not get certified and as to those people who would be excluded, they would get no relief.

THE COURT: I got it.

MR. SELLERS: And as I think our papers have made clear, the number of promotions that we negotiated were well within a range of between what the Department thought was their exposure which was well below 17 and what we thought the exposure which was above 17. And likewise, with respect to the reinstatements, the Department took the position that no reinstatements were warranted at all based on the data, and based on certain statistical measures that we applied, we concluded that the Department's exposure was somewhere in the range of six reinstatements. We ended up negotiating for four. So that again falls well within the permissible range.

THE COURT: I got it.

MR. SELLERS: With respect to the monetary exposure, Your Honor, the Department's analysis, their expert concluded that their exposure was at maximum, $1 million. Ours concluded that the range was somewhere much closer - - the maximum exposure was very close to the number we actually agreed to which was 3.8. So we regard that as a really outstanding level of payment here.

And finally, as I think the Court is all too aware from the length of this case already, the further litigation would cause delay. We'd have in the most optimistic scenario, we would have class certification, a liability trial, undoubtedly

an appeal, then individual trials on hearings on the individual's rights to relief and perhaps further appeals, and our experience - -

THE COURT: There is no question that a settlement is the way to go here. Now, whether this is the right one, I obviously have to keep an open mind.

MR. SELLERS: I understand.

THE COURT: But there is no question that what's happened here is incredible.

MR. SELLERS: All right. Well - -

THE COURT: But we don't know whether it's the right formula.

MR. SELLERS: I understand. Thank you, Your Honor.

THE COURT: All right. Mr. Birch.

MR. BIRCH: Good morning, Your Honor. I'm Assistant United States Attorney John Oliver Birch. With me at counsel table is Melinda Chandler from the Department of State.

THE COURT: Pleased to have you.

MR. BIRCH: If I could, I'd like to defer answering your question until the end and go through my analysis first.

THE COURT: Go ahead. Okay.

MR. BIRCH: As counsel has already told you, this is a settlement of a case that has been going on for 10 years. Our goal is to have it go on for another four months during the fairness hearing, and then we'll have four years worth of the consent decree.

I want to put a little perspective on this case and to give some of our reasoning as to why we think this is a case that needs to be settled. About two years ago the United States Attorneys Office met with Conrad Harper who is the legal advisor to the Secretary of State and we formulated an approach which basically led us to believe that it was in the interests of the State Department to settle both this case and the Palmer case which is the women's class action against the Foreign Service officer.

THE COURT: Where is the Palmer? Who has that?

MR. BIRCH: Judge Robinson has that, Your Honor, and just to divert, if I can, if you recall the injunctive relief of the prospective nature, that is parallel in the Palmer case and Judge Robinson granted final approval to that consent decree on February 12. So you'll note that we've started the Palmer prospective injunctive relief, and the timing on this case, if the Court approves it, starts the prospective injunctive relief on preliminary approval.

So our belief is that we're going to have parallel tracks. We're going to have the Palmer women prospective injunctive relief, and the Thomas African-Americans starting at the same time so that the reforms that the State Department wants to do can be going on at the same time.

We met with the Secretary and his staff aides, and we decided that not because we thought we were going to lose, but because we wanted to put the issue of gender and race discrimination behind us that it was in our interests to settle the case. So the State Department set up a team, some of whom are in the courtroom, and we negotiated very hard and very long with the counsel for the plaintiffs and reached the settlement which we propose to the Court.

I'd like to - - I guess I will defer to the counsel for the plaintiffs as far as their analysis of their case. Our analysis of our case was that we thought we had a very strong case and it is our judgment, although one never knows, that were we to take this case to trial, we would have won the case, and the plaintiffs, rather than getting bodacious dollars as they are in this case, would have gotten nothing.

But even if that's true, I think it's an issue of how long it would have taken to have gotten the particular relief. I'd like to summarize some of the terms of the agreement, and that will give the Court an opportunity to ask any questions or clarification that you may want.

THE COURT: Well, you know what my question is. It's the real key to the case is this opting out business, because it seems to me - - that's what I would focus on if I could. I wouldn't worry about the terms. I know they're complicated, but I think the key to the question is if somebody wants to go their own way. What would prevent them, and why should it prevent them? That's the key to it.

MR. BIRCH: Okay. I think there are two questions that you ask, and I'll try to answer both of them individually. The first question as if an individual wants to present a claim, does he have a forum before whom he can do that? I believe that an individual who wants to present his claim, does have a forum, and that is a review panel that is set up as part of the settlement agreement, and he or she can present his or her claim before that review panel and seek to get a portion of the $3.8 million that may be higher than some of this or her contemporaries based upon what he or she believes.

So in one sense, there is a forum before which one can seek to get a portion of money. Now, I think obviously when you're dividing up $3.8 million among 350 people, no one person is going to get a million dollars, which one person may want or half a million dollars which one person may want. But a person can certainly make a claim to get a higher proportion of that particular money than someone who may have been less aggrieved by alleged discrimination.

But let me come to the tough question, and a question that the Court has asked.

THE COURT: Well, what does that cover? What type of discrimination does it cover?

MR. BIRCH: It covers discrimination in denial of promotions, and it covers discrimination in terminations from the States Department.

THE COURT: Would it cover retaliation?

MR. BIRCH: No.

THE COURT: Would it cover harassment?

MR. BIRCH: No.

THE COURT: So all those are still open?

MR. BIRCH: No, those are settled by this case, Your Honor. This is - -

THE COURT: In other words, if somebody has been harassed because of their race, that they would not be able to bring a separate case?

MR. BIRCH: That's correct, Your Honor. The preclusive - -

THE COURT: Even if there was a hostile environment?

MR. BIRCH: That's correct, Your Honor. Let me step back and answer that question because this is a case that is based upon - - was settled based upon the parties' analysis of the evidence. There are claims dealing with awards. There are claims dealing with assignments. There are claims dealing with a whole range of issues that in our judgment, and I will defer to the plaintiffs, but I think in their judgment also, they didn't have a case of statistical nature that could be proven in a class action.

THE COURT: I understand that. But what I'm asking is suppose there was a supervisor that just didn't like African-Americans and harassed them and wouldn't promote them, and they can prove that specifically in a case. Why shouldn't they have a right to do it?

MR. BIRCH: I think that question goes to the point that you were making and that is what is a class action, Your Honor? Is a class action just an amalgamation of all the individual claims which go to trial before a District Judge and what does the settlement of a class action mean?

THE COURT: You say it's been denied twice? Maybe that's the reason it was denied twice by my brethren and sister.

MR. BIRCH: Well, I think the issue of typicality and commonality which are part of the Rule 23 certification issues are very strong issues, and one of the things that we briefed to the Judge when we briefed that was we didn't think there was typicality and commonality.

THE COURT: Why would - - there has got to be some safety valve provision, it would seem to me, that would allow someone who has a claim that is very individual to be able to opt out. Perhaps you could give that person - - and it wouldn't be - - look, first of all, I think you know if you can resolve this thing, I'm in your corner. We ought to resolve it.

But it would seem to me their ought to be some mechanism that either through some individual, whether it be a Magistrate Judge Kay type, whether it be me, that would say, okay, you have individualized your claim to the point where you ought to proceed and be able to opt out, but remember you're not going to get a nickel out of this settlement, so you'll have to go on your own to do it.

Would that really hurt you very badly?

MR. BIRCH: Absolutely, Your Honor. Absolutely. As far as we're concerned, if people are allowed to opt out of this, then the settlement does not get the State Department the benefit that it has sought by settling this case. We have actively opposed settling this case and ultimately we reached an agreement where the agreement is silent on the issue, but we believe - - if I may, Your Honor, we believe quite strongly that there should not be opt outs allowed as a matter of two things.

One, in out judgment, the law does not allow opting out of a (b)(2) class. But let's talk practicalities, because I know that's - -

THE COURT: Well, you can always do it by agreement.

MR. BIRCH: And we're not going to agree to that, and I'll tell you why, Your Honor. We want this to be put behind us. Remember when I started off saying that this has been a 10 year lawsuit that four months from now when you sign the fairness agreement, if you do, that will mean that we have put it behind us.

If we can't put it behind us, then we lose the benefit of our bargain. When I met with the Secretary of State and when I met with the legal advisory, what we decided was we want to put this behind us so that we can move forward in a spirit that is not litigious. We don't want to fight in this Court. We want peace. It's kind of - -

THE COURT: Don't you think that there are enough people that understand that that would be willing to say that for the good of all, we're going to go in on this thing. I mean, if there is a very small group or body that would opt out, you know, it's not an easy road for those people.

First of all, they'll be giving up all the benefits here. Secondly, they would have to go out and get their own lawyer and have to go out and prove a case, and it's not easy. I don't know how they would do it. I don't think the risk is that great to the government.

MR. BIRCH: Your Honor, part of our decision to settle the case at the rates at which we did, and you heard Mr. Sellers talk about how close to their goal that they got, part of our reason for settling the case at he rates we did was to buy peace in our time, and I don't mean that in a facetious - -

THE COURT: But you're saying that you agree that that issue is open and it's governed by other cases now before the Court of Appeals.

MR. BIRCH: Judge Johnson in the Cook class action determined that under the law, she did not have the authority to allow opt outs, and she therefore so ruled. A number of the plaintiffs in the Cook case have appealed that. We have filed motions for summary affirmance, and the issue is fully briefed before the Court of Appeals.

THE COURT: Now, how would that work here in this case? What this would say is - - it would be silent on opting out, right?

MR. BIRCH: Let me tell you how I think it would work, Judge. I think that there will be - - I think there is a possibility that some plaintiffs will move to opt out of the settlement if you ultimately agree to sing the final decree.

THE COURT: Right.

MR. BIRCH: And you have to rules as to whether under the law the government having declined to allow them to do that, whether under the law they have the right to do that. Let's assume that you rule that they don't have the right, following Judge Johnson's precedent. They then would appeal it. It's likely that - -

THE COURT: let's say I say they have the right. What would that do then?

MR. BIRCH: Then we would appeal it.

THE COURT: You would appeal it, but the deal would go through.

MR. BIRCH: That's correct. The agreement is silent on that issue.

THE COURT: All right. So I still would have that right to say that they have the right to opt out; is that right?

MR. BIRCH: Well, you have the right, but the question is whether the law allows you to do that.

THE COURT: I'm not being precluded from anything in the agreement. And that would not come to my attention until somebody raised it.

MR. BIRCH: They have to file a brief. We have to oppose it, and the agreement is silent. The agreement does not preclude the issue.

THE COURT: Right. That may well be the safety valve then. I mean, I don't know how I would rule on it, but that may well be the safety valve that those people would have the right to come here.

Now, would they have to do that before the final approval or after the final - -

MR. BIRCH: I think that they would probably as part of their comments on the fairness of the thing present that issue to the Court. Now, it's not a painless process because if a person wants to opt out, that may have an effect as to the timing of the payment of the money to the rest of the class.

Let's say one person comes and says I want to opt out, and let's say you - -

THE COURT: Well, should that be put in the notice that goes to them that if they want to opt out, they ought to-- they better - you know, spell out that you don't believe they have the right, and this would be something that I would decide, but they ought to do it before the final fairness determination or you don't think you can do that?

MR. BIRCH: I think that the notice that goes out to the class is something that the Court has to determine is appropriate. I frankly don't want to encourage - -

THE COURT: Well, I don't want to do it. But what I do want to do is deal with your problem which is a good one, and that is to get it so that - - I don't want somebody two years down the road that says - - I think the opting out has got to be inconsistent with the timetable, doesn't it?

MR. BIRCH: I think that the issue of whether someone is allowed to opt out has to be decided contemporaneous with the fairness hearing.

THE COURT: And we ought to tell them, tell the people that that's the fact, if we go through with it, so they know they got to come in and do it. That ought to be built into the process. Otherwise, you're going to - - look, I'm trying to make this thing work.

MR. BIRCH: You know, once you sign the fairness approval, if someone comes in two years late, I think that all the parties would agree that they're too late, Your Honor. It's one ball of wax.

THE COURT: Well, I think you ought to somehow put that in there. It's not going to cost you anything to do it, and it's only going to help you.

MR. BIRCH: I don't disagree with what the Court is saying, but I have to emphasize - - I can't emphasize how strongly, and Judge Kay will be aware of that, because he did, how strongly this opt out issue is to the government. In our mind, the whole purpose of this settlement was to put the whole issue behind us. And if one person is allowed to opt out, as far as we're concerned, of course, we don't think you have the authority under the law, but that's a different issue. We have lost the major benefit of our bargaining.

THE COURT: Well, I think you overstate it. I mean, if one person - - to have to have one person that can throw a monkey wrench into this thing, it's unfair as a democratic matter. I think it's unfair to all those people that really want to do this thing.

MR. BIRCH: Your Honor, with all due respect, having gone through this process, I'm not overstating my client's position.

THE COURT: No, I didn't mean it that way. I think it came out wrong with what I was trying to say. I'm not trying - - I understand your position. But what I'm concerned about is something that others may well want strongly to give somebody - - all your doing is giving somebody the right to hold you up, and that's the thing that's bothersome.

MR. BIRCH: Let me come at it from a different perspective if I may, Your Honor. There are (b)(2) classes and there are (b)(3) classes. A (b)(2) class, which this is, is a class that is primarily oriented toward prospective injunctive relief that is going to change an organization. And as the Court is aware based upon having read the consent decree and the memorandum and listened to counsel, that's what this is. This is designed to ensure that there are no problems at the State Department.

There are Council on Equality. There's an affirmative action plan, There are more committees set up. Counsel for plaintiffs are going to get $100,000 a year just to monitor the State Department to make sure that we're complying with the agreement. That's what a (b)(2) class is. And the relief which the plaintiffs get, while not insubstantial, is ancillary to that.

Now, a (b)(3) class has no prospective injunctive relief, and you can opt out of a (b)(3) class under the law. If it's the kind that's (b)(2) and they want the injunctive relief to benefit the class, then there is a price that they have to pay for that.

THE COURT: Yes, but you see what you're doing, this is a combination of (2) and (3).

MR. BIRCH: No, it isn't, Your Honor, It's a (b)(2) class, It's stated as a consent decree as a (b)(2) and under the law it's a (b)(2).

THE COURT: Yeah, but the problem is that a future injunctive relief doesn't remedy that past wrongs. That's the only thing. That's the problem. And some of these people might have been wronged and need to be individually taken care of.

Well, look, that all goes into whether we have a proper class here. But I think what you're going to have to do is get the notice so that people will understand what their rights are, and if they want to exercise any right, the ought to do it timely, so we don't have this thing going on and on.

MR. BIRCH: I understand, Your Honor.

THE COURT: Okay.

MR. BIRCH: Is there any other question?

THE COURT: No, I'm fine. And I want to give some of the parties here who have an interest other than - look, you've all done a -- really, how can I say it any better that I've said it. This is a heck of a job.

MR. BIRCH: Thank you, Your Honor.

THE COURT: Very well done, and very fairly done. All right. Now, is there someone that would want to be heard on this?

MS. HUTCHINSON: Your Honor, Barbara Hutchinson.

THE COURT: All right, Ms. Hutchinson, I'm going to give you your chance.

MS. HUTCHINSON: You Honor, I'm here for Mr. Walter Thomas and Mr. Allen Latimer who are named plaintiffs in this action. And under the terms of this current decree, they as named plaintiffs would have their individual claims resolved without their agreement The did not agree to the individual provisions that are outlined in Section F, Exhibit F to the consent decree.

They did notify the plaintiffs' counsel that they did not agree to settle their claims for that, and if the Court gives approval to this process, then they would be bound by the amounts as resolving their individual claims, and they could never raise them again. That would result in an immediate appeal so that they have the right to appeal the consent decree as named plaintiffs.

THE COURT: Well, let's look at it down the road a little it. What's the next step? Suppose I say, go ahead. You opt out. Would that take care of your problem?

MS. HUTCHINSON: We do not wish to opt out, and the law has said that as named plaintiffs, they shouldn't be forced to do that after beginning litigation and at the end just be said, you go out and do your own claim.

THE COURT: Well, you don't want to opt out?

MS. HUTCHINSON: No, we don't. We would like this process --

THE COURT: Well, but, you see, the problem here is these people have negotiated a settlement, and now to come in and try to upset that, that's unfair, because you'll never have people that will settle these things. What happens when somebody like you comes in and complains, it means that the

agreement that was worked out then becomes the minimal thing and it doesn't become a final settlement. This was a long negotiated - this took place over many, many months.

MS. HUTCHINSON: Bit, if, in fact, the plaintiffs had not complained and told their counsel that they didn't agree to those amounts, I would say Your Honor would be correct. But these individuals in 1995, a year ago, said we will not agree to this amount.

THE COURT: Look, you got a practical problem here. Just think about it. If I agree with you and say, okay, you're right. It's a terrible settlement. I don't give it approval.

MS. HUTCHINSON: No, Your Honor.

THE COURT: You're back where you started from. Then what we got to do is to determine whether this is a class action. And I think if you've been listening here, it may well be that it is not a proper class action and everybody then will have to go and bring their own action. I mean, that's what you got to see.

MS. HUTCHINSON: Your Honor, I don't --

THE COURT: This thing is not going to go back into negotiation. That's what you're suggesting they go back in. Mr. Birch has told you that that's it. You got all the blood that they're going to give here. They have no more to give. I don't know if that's a good -- but, these people, I don't know whether they're going to stat at that bargaining table, but I think they've done as much as they can do.

So what is it that you think you can do?

MS. HUTCHINSON: I think that there can be a process whereby a person can take their individual claim and I proposed this, to say the review panel. The review panel as it's currently composed only can review, not like Mr. Birch said all types of discrimination. It can only review a claim's egregiousness. It can't review race discrimination. It can't review -- it can only make a determination about terminations and egregiousness.

Say for instance someone like my clients, they can't get their claim of Mr. Latimer who was - who is at the FS-1 level. There is no promotions provided under this agreement for him. And people in his standing, there is no promotions. Because his next promotion would be into the FEC and FOC level. So he can't even potentially qualify under the terms of this agreement to get any type of relief.

THE COURT: And that means he goes and opts out.

MS. HUTCHINSON: Well, but if he opts out, he has to start all over again, which is unfair to him. He joined this group saying my claims will be heard.

THE COURT: What happens if the other side says you're not going to get a nickel more. You're not going to get anything more. I'm assuming they don't come to me unless that's their posture. If it's not their posture, then I'll say, Judge Kay, go ahead. Go and deal. We got some more people coming in. Remember, you're about the third or fourth lawyer that's represented Mr. Thomas; am I correct?

MS. HUTCHINSON: I think only the third.

THE COURT: Only the third?

MR. BIRCH: I'll say we're not going to negotiate, not one more nickel, no more blood. I don't know how else to say it.

MS. HUTCHINSON: Well, then he gets the right to go to an individual review panel. He shouldn't be just forced to start anew. He started this claim. He started this suit. He has not agreed to the settlement.

THE COURT: I can send you back. Look, this is something - if I could give it to you, I'd say, here, take it. I can't give it to you. This is something that's negotiated between the parties.

MS. HUTCHINSON: You can give as part of this decree a review panel of individual claims.

THE COURT: I can't. Can I do that?

MS. HUTCHINSON: Yes.

THE COURT: I don't know. Where do I have the right to change your deal?

MS. HUTCHINSON: That's up to the Court as to whether or not this decree would appropriately provide the relief, whether or not Mr. Thomas had agreed to resolve his claims. As part of this, the Court can modify the decree, as it see fit, to provide those kinds of --

THE COURT: Is that right? I have that authority to do it and it is not a consensual matter?

MS. HUTCHINSON: No, it isn't.

THE COURT: Mr. Birch, you agree with that?

MR. BIRCH: Your Honor, absolutely not. It's up or down. Either --

THE COURT: I mean, I don't have the - what you're saying is I can conditionally approve it; is that what you're saying?

MS. HUTCHINSON: Your Honor, in the Pettway versus American Cast Iron, and also Mandujano, they let the individual plaintiffs' claims remain. They severed them from the consent decree, and the individual plaintiffs' claims remained pending and in some of the agreements they go - in Pettway it went under the actual consent decree for those claims to have a hearing.

But not to put the people back out into litigation all on their own.

THE COURT: But I can't go and change --

MS. HUTCHINSON: The Court modified it, yes, they did.

THE COURT: Modified it only because the parties agreed to accept the modification. Am I correct on that?

MS. HUTCHINSON: Well, I don't know if the Court did it on its own, but in the process of review, if the Court would find that these people's claims weren't addressed, it could do it on that basis as part of the review of the consent agreement. Yes, the can.

THE COURT: Well, I thought the only thing I could do, and I've done this in the past, I could give conditional approval, if you'll do A, B or C. That's about all I can do. And if Birch is telling me that, look, Judge, we're not going to do it. You know, I've been through it. Look at my thing with Microsoft. I tried to change that. You saw what happened there, don't you? I got thrown out of the case. Not only wasn't I - and all I tried to put on there was some simple little things.

MR. HUTCHINSON: Well, Your Honor, then you would have no choice under the law, under even the case that the defendants cite, you cannot compromise the plaintiffs' claim without their agreement, so that if, in fact, Mr. Birch's position is that, you know, no, never, then you cannot provide an agreement that says these people's claims are over.

Parker, the case that was cited by the plaintiffs' counsel, definitely said the plaintiffs' claims are out. So does Mandujano. So does Pettway versus American Cast Iron. The plaintiffs' claims - it's so simple that their claims can't be compromised. so this won't be over if, in fact, Mr. Birch's position is these people's claims could not got to an individual hearing.

THE COURT: Well, I think they agree that that issue of opting out is open, and I'm willing to decide that issue. But you're taking a different position. Your position is that you want me to make - to sweeten this agreement up a little bit. I don't think there is any more sugar. That's the problem.

MS. HUTCHINSON: I think that the Court can put in an independent hearing panel. I think that that would hear people's claims if those people so chose not to take the language of the agreement that is currently in. It's the same as the opt out, except it extends to the individuals the right to go to that review panel.

THE COURT: But that review panel would only then be rearranging the parties' rights; is that right? Because you know that there is no more money to be given, right?

MS. HUTCHINSON: I don't know about that.

THE COURT: Well, I mean, they told you. That's their - they gave you a figure, didn't they? I mean does that figure have a chance to go up a little bit?

MR. BIRCH: Absolutely not, Your Honor. It's been approved by the Deputy and the Associate Attorney General. The 3.8 million is 3.8 million is 3.8 million.

THE COURT: It sounds like when I go to my diabetes doctor, I like to get a little more sugar, but I can't get it. I mean, too much sugar, a little more insulin. But, you know, the, there is no more to give as he tells me. And they've told you they've given all the sugar that they can give in this case.

MS. HUTCHINSON: Well, the fact of the matter is, this claim and this decree doesn't present --

THE COURT: Well, then what you're saying to me is disapprove the whole decree and if what you're saying therefore is if I do that, I don't know where I will be, because I will have very few parties left here.

MS. HUTCHINSON: Well, Your Honor, that's why I think it's within the Court's discretion to approve a panel and regardless of whether or not the parties think that's fair, if it would be fair to the class --

THE COURT: Well, the panel problem is that what you're going to do is since there's going to be no more money then it means that somebody is going to get something that somebody else isn't going to get, and it's just going to be a rearranging the --

MS. HUTCHINSON: Well, this happens in many class actions where people go to take their claim forward to a panel.

THE COURT: Well, I think there is a panel here that's going to --

MS. HUTCHINSON: But it only reviews terminations and it only reviews egregious claims.

THE COURT: And what would you like it to --

MS. HUTCHINSON: And I think it should review an individual's claim for the merit of the claim, and award the individual relief within the confines of the amounts that are available.

THE COURT: Is there a reason why that can't be done, Mr. Birch?

MR. CONNELLY: Let me just try and explain how the review panel would work in the circumstance of an individual who has been terminated.

THE COURT: Right.

MR. CONNELLY: There are a few plaintiffs that fall in that category, including Ms. Hutchinson's client, Mr. Thomas. There is a total of $775,000 that is theoretically available to a relatively small group of people who have been terminated. All right.

That 775 is divided into two pools, 200,00 and 575,000. There are about 20 people, our best estimate, in the termination group who are theoretically eligible to share in that 775. The first 200 piece is going to go by a formula to all 20. It will be divided up. The second piece, the 575, is going to be awarded to a maximum of four people, four terminated individuals, based on the criteria that are set in the agreement. There is a limit on the amount any individual of those four could get from the 575. It is $250,000. Theoretically, a person like Mr. Thomas could get under this agreement $250,000.

THE COURT: Is he one of the four people?

MR. CONNELLY: The panel will decide which four. He is one of the people eligible to apply for that money. But we can't say as we sit here that he's got the best case.

THE COURT: What is it that you would like the panel to — how would you like the panel to be changed?

MS. HUTCHINSON: I would like the panel to be changed because the way they have it constructed disadvantages a client of mine such as Mr. Latimer. Mr. Latimer has a promotion. So he doesn't get to go to a panel at all to have a review of his claims because that's not available under this review panel. The review panel is limited — and in addition, the reinstatement provisions of this decree are limited to employees who didn't receive tenure. My client, Mr. Thomas, can't get a review of whether he ought to be reinstated.

So the review panel can't review that. All they can do is say, well, here is some money, but you can't get reinstated, and you're not eligible to get reinstated under the reinstatement criteria. So he doesn't get a review of his claims.

THE COURT: All right.

MS. HUTCHINSON: And I say that if the review panel reviews individual's claims and individuals apply, you know, one of the things about this formula of distributing to all, you distribute to all, well, it could be that that formula is very well and good, but it could be that also individuals who have claims are unable to get those claims addressed, and as a named plaintiff, certainly, you know, he's entitles to get his claims addressed, and so is Mr. Latimer, and they certainly gave everybody notice about this.

These parties weren't unaware that these people disagreed with this. And these parties weren't unaware and the individuals provided them alternatives, such as a review panel. They just rejected the idea.

THE COURT: You don't disagree with the money?

MS. HUTCHINSON: No.

THE COURT: You don't disagree with anything here other than you would like to have the system changed a little bit; is that what you're saying?

MS. HUTCHINSON: Yes, to have them have an opportunity to have their claims reviewed, yes.

THE COURT: Okay. Thank you very much.

MS. HUTCHINSON: Thank you.

THE COURT: All right. Now, who else wants to be heard? Let me hear anybody else that's present at this hearing who would like to be heard?

Mr. Thomas, you've already been heard by your lawyer. You want to be heard in addition to your lawyer?

MR. THOMAS: I want to say just a couple of things, Your Honor. Your Honor, I'm just — I want to make sure that I heard correctly, an I'm not sure, when Mr. Connelly said that there had been no objections from the plaintiffs with regard to — and I'm asking this question because I want to get a clarification on that before I respond. Did he say while he was talking that there had been several presentations and that there had been no objection from the plaintiffs? So I'm asking that question. Maybe you can clarify it.

MR. CONNELLY: I'll answer it right now, Your Honor, I said there had been no objections to the prospective relief or to the injunction.

THE COURT: And you don't object to that, do you?

MS. HUTCHINSON: Yes.

MR. THOMAS: Your Honor, we objected in writing, and I believe we even contacted the Court with regard to the things that we objected to in the document.

THE COURT: You object to the injunction?

MR. THOMAS: Your Honor, I don't have before me here what I objected to, so I don't have it memorized, but let me just say this. I believe I forwarded it with the approval of the committee a letter to the Court which said to the Court that there were things happening with this case about which we were not being consulted and which we weren't a part of.

And it's my understanding that when it's mentioned that the parties agreed, it is not the understanding of the 20 who objected and who object to this present consent decree in its present --

THE COURT: But, Mr. Thomas, --

MR. THOMAS: Let me --

THE COURT: I've heard you before, and --

MR. THOMAS: Well, then I'll finish then, Your Honor. let me just say this then, You have, indeed. And my references are to all of the objections that we have made including the vote that was recently taken in January and February. I will leave it there. I will leave it to the rest who have come here today.

THE COURT: Let me ask you something. You want this thing — you want the agreement to be rejected; is that what you're saying?

MR. THOMAS: No, I want the agreement rejected in its present form. You asked me before, Your Honor, what portion or about how much or what percentage f it was it that I objected to.

THE COURT: You said about 70 percent.

MR. THOMAS: No, I said I think about 30.

THE COURT: You said you approve 70 percent. You objected to the 30.

MR. THOMAS: And I asked the Court not to hold me to that number firm, and you said you wouldn't.

THE COURT: It could be 65 to 35, I got you.

MR. THOMAS: But at any rate, your Honor, I just — rather than have you hear me again, you're right. Let me then defer and maybe at the end I could --

THE COURT: Let me give you what it is. you know, you people are very intelligent because you're diplomats and you're probably one of the most elite organizations in all government. And if you recall when government was started, I think there were only, what, there were — you had the Justice Department, you had the State Department. Was there a third department?

MR. SELLERS: Department of Treasury.

THE COURT: Oh Treasury. That's the only three we had in this whole country. So you got a long standing group there and in my dealings over the years, I didn't even know

what you people — I couldn't understand you people you talk in such an atmosphere that I always had difficulty. I probably needed and interpreter.

But so you understand things very well. I mean, there is no question about it. And this is a very simple thing. Either we're going to have this thing settled or we're going to go to war. you understand war and you understand settlement. Either you're going to negotiate or you're going to go to war. It's almost like Bosnia.

And these people spent their time trying to get this thing worked out. They've done the best they could. I honestly believe that. I don't believe that Judge Kay would have given his approval to something that he didn't believe was the best that could be worked out. There isn't any more to give here on the negotiating table.

Therefore, what you got to do is vote and if you vote not to accept it, then you understand where we are. Where we are is we're back in litigation. The chances of settlement almost are nil at that point. The first issue then that I will have to decide is whether there is to be a class certification.

As I understand it, two times before that's been denied. As I can see here, one of the reasons why people are objecting is that they believe that they have individual claims which would go to rejecting the class certification. So that would mean that you and your 29 people that started this, I think I got that number right, would then have to make your own case. And you'd be starting almost from scratch. You would have the benefit of all the work that's gone in I would assume, and then we would go on a track that we would go and try this case. That's where you are.

And you've got to make — you know, a lot of time choices are very difficult. And the question is what choice do you want. Do you think that it is so contrary to your interests that you believe that you would want to go the route of litigating, you can vote that. And everybody has to have the right to vote it. But I don't know what else I can tell you.

there is nothing to give any more. I mean, for this negotiation to start again, I think that I would be demeaning your very intelligent lawyers who represent you and demeaning the government who are intelligent. I don't want to say they're not, but they're hard-nosed. And I've dealt with them in the past, and they give very little.

MR. THOMAS: May I briefly say then, Your Honor, --

THE COURT: I think they gave a lot in this case, but I think they're not going to give a whole lot more.

MR. THOMAS: Let me briefly say then that the Court received at least a copy of the vote.

THE COURT: Right.

MR. THOMAS: And it wasn't just my vote, Your Honor. So I'll leave this for the moment. You had asked the last time that other people be able to be heard, and I certainly believe in that. So I'll just part by saying that I think that with the result of what you have seen and maybe something you haven't seen, but what you have seen, we've stated our position and --

THE COURT: What do you want me to do? What's your bottom line? Give me the bottom line.

MR. THOMAS: The bottom line as we see it, Your Honor, is that this present consent decree, which the 20 of us believe that we were not fully a part of, and I've written that, I've said it, I've done everything I could. So the bottom line is, your Honor, that we have said that no deal is better than a bad one, and we, in the present form this consent decree, consider it a bad deal. I'm not trying to be smart or persnickety. I'm saying that you asked me what is the bottom line.

THE COURT: All right. Your bottom line is to reject it, not to find that it's — not to give preliminary approval; is that what you're saying?

MR. THOMAS: If, in fact, you would be approving this present consent decree as you see it, yes, Your Honor.

THE COURT: Okay. You're right. You've said it as clear as can be.

MR. THOMAS: And the vote was taken.

THE COURT: All right. Anybody else want to be heard quickly?

MS. WATSON: Good morning, Your Honor. Theresa Watson. I'm representing the named plaintiffs, Isaiah Aldridge, Herman Bailey, Johney Brooks, Tushinde Cooper, E. Lloyd Davis, Odie Fields, Judith Francis, Constance Huggins, Alfonso Marquis, Ward Morrow, Alfred Neal, Raymond Robinson, Cynthia Smoot, Melvin Spence, Vandoster Tabb, Robert Watkins and Dorothy Watson and these are the several -- I think about nine of the named plaintiffs are present in the room, and they are available to speak or to give their views on the consent decree.

THE COURT: Can you give me what the bottom line is?

MS. WATSON: The bottom line is just as Mr. Thomas indicated. The do not agree to the consent decree.

THE COURT: In other words, they want me no to --

MS. WATSON. To grant preliminary.

THE COURT: Not to give preliminary approval?

MS. WATSON: That's correct.

THE COURT: And that to go into litigation?

MS. WATSON: Well, if that is what happens. We really would like to continue to work out the details of the individual claims and have some methodology for dealing with their individual claims, because they feel that they're not addressed and that their claims would be compromised were this consent agreement in its current form to be approved.

THE COURT: Okay. I got you. Would you give the names to the reporter. She didn't get them.

MS. WATSON: Oh, yes, I will.

THE COURT: Do you have them written down?

MS. WATSON: Yes, I do.

THE COURT: All right.

MS. WATSON: And if it turns out that notices are going out to the class, we wish to have the objections of the 20 plaintiffs, named plaintiffs also submitted.

THE COURT: I got you. Would that be any problem, gentlemen?

MR. BIRCH: Your Honor, if I may suggest that you made a suggestion about the notice and I would be willing to meet with the opposing counsel to see whether any modification is — we may reach an agreement. We may not. But I think we should probably get together.

THE COURT: Yes, it seems to me that some people put it in there because otherwise they're going to send it out on their own anyway, so what's the difference?

MR. BIRCH: Well, I think, frankly, the State Department cables have been very active as it is already.

THE COURT: All right. Anybody else want to be heard? Go ahead. Real quick. I'm going to give you each about 30 seconds. So com on up, get in line. Identify your self and tell me what you bottom line is on this.

MR. BAILEY: My name is Herman Bailey. I'm a retired military, retired Foreign Service Officer. I object to the consent decree as written based upon the fact it does not protect my legal rights. Basically under this agreement, I will not be availed the opportunity to be promoted, eve though a panel, duly appointed panel, by the State Department Identified me for promotion. I do have a P before my name. But under this provision, it makes no provisions for promotion.

THE COURT: Would you opt out then?

MR. BAILEY: Would I opt out? I would prefer to go to arbitration and/or mediation in order to resolve my complaint.

THE COURT: What about arbitration or mediation for particular — would that cause you a problem, Mr. Birch?

MR. BIRCH: Yes, Your Honor.

THE COURT: It would. Okay. Go ahead.

MS. DOROTHY WATSON: My name is Dorothy Watson, and I'm an administrative officer since 1980 in the Foreign Service, and I disagree with this consent decree because it does not address my complaints. Since 1985, I have filed a complaint with the State Department., and since that time have been retaliated and harassed for up until this date. And I do not feel that this is addressed anywhere in this consent decree.

There is nothing dealing in the prospective relief about how the Department determines to rid this system of that. This is a terrible management style that they have there where they protect people who continue to discriminate against minorities.

THE COURT: Would you opt out then?

MS. DOROTHY WATSON: Would I opt out?

THE COURT: And bring your own claim?

MS. DOROTHY WATSON: I haven't thought about that yet, so I can't answer that at this point.

THE COURT: Okay, thank you.

MS DOROTHY WATSON: But I want to talk about this prospective relief that I feel that is definitely needed. Those persons who can continue to discriminate against us, nothing happens to them. They have a grievance system over there where you file a grievance, and I've had to file three and have the grievance ruled in my favor. But even when they're ruled in your favor, it's a Catch-22. You lose-lose anyway, because what happens is the expunge your file.

So then how can your file go before a panel and how can you get this precious P that everyone keeps talking about if that happens to you?

THE COURT: Well, but you understand now this new system that's gong to be --

MS DOROTHY WATSON: The new system doesn't deal with that, sir. It doesn't give any remedies with working with people. How do you punish the persons who discriminate? There is nothing, and I've been talking to them for many years about this. There needs to be a system where if you — if a discrimination charge is ruled against you, then you need to know that you're not going to be promoted or give an award. That is not the system over there.

THE COURT: Let me say, I think this can be accommodated in your system that you have. I think she's got a good point. I don't see how anybody is hurt by agreeing to what she said. That would not hurt your prospective relief, would it?

MR. CONNELLY: Your Honor, not only does it no hurt us, it's a part of something we intend to take care of.

THE COURT: All right. Why don't you talk to them. I think they can accommodate that. Okay? I think that's not going to cause a problem. Thank you.

MR. BIRCH: Your Honor, I think it's already in there already.

THE COURT: I mean, that's like apple pie. It really is.

MR. BIRCH: It's already in there, Your Honor.

THE COURT: Okay. Go ahead.

MR. DAVIS: Good morning, Your Honor. My name is E. Lloyd --

THE COURT: See that, you won already.

MS. DOROTHY WATSON: It's not in there.

THE COURT: Well, wait. Why don't you put it in writing and then we'll see whether it's in there or not. Okay? I think that's something that can be dealt with. The lawyers tell me it's in there, and it's not going to cost anybody a nickel to be in there.. And I think what you make is a good point.

Okay. Just put it in writing and we'll see what we can do. Go ahead.

MR. DAVIS: Good morning. My name is E. Lloyd Davis. To start off, I haven't given any consideration to this opting out you're talking about. I was mandatorily retired in 1990 after 24 years of service without having been promoted once. I attended the National War College, which is one of the --

THE COURT: You were never promoted in 24 years?

MR. DAVIS: In 24 years. I attended the National War College of the National Defense University which is one of the Department's --

THE COURT: Let me ask you something. I've got a little bit of a time bind. Can we hold these — I'd like to hear some more of this tomorrow. Could we do this — you're all in town. Is anybody out of town here? Where are yo coming from?

MR. DAVIS: Baltimore.

THE COURT: Well, that's not out of town.

MR. DAVIS: That's what they're trying to say now. They're trying to make Washington and Baltimore --

THE COURT: Go ahead.

MR. BAILEY: Florida.

THE COURT: Florida. Well, do you have to go back today?

MR. BAILEY: I don't have to go back today. But yo only gave us 30 seconds. that wasn't enough time.

THE COURT: Well, then what time tomorrow could I do it?

THE DEPUTY CLERK: 2:00 o'clock, Judge.

THE COURT: Yes, I'll be back by 2:00 o'clock tomorrow. All right. We will reconvene this hearing at 2:00 o'clock tomorrow.

MR. DAVIS: So I didn't even get 30 seconds?

THE COURT: I'm going to give you more time. That's why. I don't want to limit yo to 30 seconds. What you told me caused me a problem when you said for 24 years you have no been promoted.

MR. DAVIS: It caused me a problem, too, Your Honor.

THE COURT: Sixteen years or 24 years?

MR. DAVIS: Twenty-four years.

THE COURT: What do you mean? you came in — at what rank did you come in?

MR. DAVIS: I came in as a — at the time they had Foreign Service staff officers. I came in as a Foreign staff officer 1 in 1966. And I was mandatorily retired as a Foreign Service officer. FSO-1 in 1990.

THE COURT: Never been promoted in --

MR. DAVIS: Twenty-four years.

THE COURT: Twenty-four years.

MR. DAVIS: And as many times as you ask me it's going to be the same thing because it's difficult for me to understand, too.

THE COURT: And you had good rating all throughout that whole --

MR. DAVIS: Good ratings, superior honor award with $2,000 cash award, meritorious award from San Salvador, El Salvador, a superior honor award from Havana, Cuba.

THE COURT: 2:00 o'clock tomorrow then we will reconvene this. All right.

(Whereupon, the proceedings were concluded at 10:40 o'clock a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

BEVERLY J. BYRNE
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CA 86-2850

WALTER THOMAS,

Plaintiff,

vs.

JAMES BAKER,

Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE.

Filed: July 15, 1996

APPEARANCES:

For the Plaintiff:
Akin, Gump, Strauss, Hauer & Field
By: WARREN CONNELLY, ESQ.
RICHARD SCHLEGAL, ESQ.
MICHAEL MADIGAN, ESQ.
1333 New Hampshire Avenue, N.W.
Suite 4000
Washington, D.C. 20036

Washington Lawyer's Committee
for Civil Rights and Urban Afairs
By: AVIS E. BUCHANAN, ESQ.
JOSEPH M. SELLERS, ESQ.
1300 19th Street, N.W.
Suite 500
Washington, D.C. 20036

BARBARA B. HUTCHINSON, ESQ.
7907 Powhatan Street
New Carrollton, Maryland 20784

THERESA L. WATSON, ESQ.
601 Pennsylvania Avenue, N.W.
Suite 700, North Building
Washington, D.C. 20004

For the Defendant:
JOHN BIRCH, ESQ.
United States Attorney's Office
555 Fourth Street, N.W.
Washington, D.C. 20001
State Department
MELINDA CHANDLER, ESQ.
RUTH WHITESIDE, ESQ.

Court Reporter:
BEVERLY J. BYRNE
Official Court Reporter
Room 6810 U.S. Courthouse
Washington, D.C. 20001
(202) 273-0899

Proceedings reported by stenomask, transcript produced from dictation.

INDEX

	Direct	Cross	Redirect	Recross
PLAINTIFFS:				
Kerry Kirkland	11	19	31	--
Alan Latimer	94	115	--	--
Bruce E. Thomas	118	--	--	--
Odie N. Fields	137	--	--	--
Ray Robinson	143	--	--	--
Mary Cynthia Smoot	154	160	--	--
Dorothy Watson	162	--	--	--
Alfred Neal, Jr.	170	176	--	--
Bisa Williams-Manigault	176	--	--	--
Charlotte Williams	192	--	--	--
Bernard Johns	197	--	--	--
Lisa Ruth Layne	200	--	--	--
Edith Spruill	204	--	--	--
Robert E. Watkins, Jr.	209	--	--	--
Earle Scarlett	212	--	--	--
Walter Thomas	234	--	--	--

EXHIBITS:	MARKED	RECEIVED
Government's Exhibit No. 1	86	--
Plaintiffs' Class Exhibit No. 1	91	--
Plaintiff Thomas' Exhibit No. 1	235	--

THE DEPUTY CLERK: Civil Action 86-2850. Walter Thomas versus James Baker. Would counsel please state your names and who you represent for the record.

MR. SELLERS: Joseph Sellers, plaintiff class. Your Honor

MR. CONNELLY: Warren Connelly representing the class.

MR. MADIGAN: Michael Madigan. Your Honor.

MS. BUCHANAN: Avis Buchanan on behalf of the class.

MR. SCHLEGEL: Richard Schlegel on behalf of the class.

MS. HUTCHINSON: Barbara Hutchinson on behalf of Walter Thomas and Alan Latimer.

MS. WATSON: Theresa Watson on behalf of 16 plaintiffs that were listed in my appearance, with the exclusion of Robert Watkins and Alfonso Markee.

MR. BIRCH: John Oliver Birch for he Department of State.

MS CHANDLER: Melinda Chandler, Office of Legal Advisory, Department of State.

MR. BIRCH: Your Honor, with me at counsel table is Ruth Whiteside who is the Deputy Assistant Secretary of State.

THE COURT: Do we have everybody now? Okay. As you know, we're here to day proposed consent decree that has been negotiated and filed in this matter. It goes without saying that it has involved a great deal of hard work from many people, especially the plaintiffs who originally brought this action almost a decade ago.'

The case has a long history and involves issues that are deeply personal to many of those in attendance today. I said in the preliminary fairness hearing that was held on March 21, 1996, I want to hear from as many of you as

possible. I've set aside this entire day, even though I was in the middle of a four month trial, and I just adjourned that, so you're going to have my attention for the entire day.

I've reviewed your submissions. I've made them part of the record. I understand that the members of the special review committee are here today. Where are these folks? Do they want to come up? Why don't you folks come up here. We'll get you some--I wan to thank them for their efforts and for the work that they did.

What I will do is listen to the -- the order today will be the counsel for the class plaintiffs, and I gather Mr. Kirkland wants to be heard; is that correct?

MR. SELLERS: Yes, Your Honor. We'd like to Mr. Kirkland.

THE COURT: All right. And then I'll hear counsel for the defendants, and then I want to hear Ms. Watson's argument.

The average amount that the named plaintiffs and interveners will receive is $32,500. The average amount that each of the 244 other class members will receive is $12,000. We are pleased that the relief is so widespread, and the amounts are significant on a per person basis. And just by way of contrast, because sometimes our case is compared to the Palmer case, which was the class action involving the women Foreign Service Officers. The amount of the relief on a per person basis in the Palmer case was a little under $5,000. So the amount on a per person basis in our case is over double that.

I might also mention that in the Palmer case, the class was 1,500 individuals, and there were 22 promotions. In our case, our class is 357 individuals and there are 17 promotions. So --

THE COURT: Seventeen out of how many?

MR. CONNELLY: Out of 357, compared to 22 out of 1,500. So we think our --

THE COURT: And the four reinstated.

MR. CONNELLY: That was not an issue in the Palmer case, Your Honor, so there were no reinstatements to my knowledge in the Palmer case.

THE COURT: But in our case, it's four.

MR. CONNELLY: Four.

THE COURT: Four out of eight?

MR. CONNELLY: Eight applied, that's correct, Your Honor, and four were reinstated.

THE COURT: What do you do now with the --you have 83 people that are not going to get anything out of this. What about those folks? Why should they -- I mean, what's in it for them to settle this thing?

MR. CONNELLY: Well, what they get out of it, of course, is the benefit of the prospective relief and the injunction. But let me point out, Your Honor, that the way we designed the relief mechanisms was intended not to just give money on a pro rata basis, but to target it at those people who we fairly conclude had suffered discrimination.

So a great many of the people who are excluded are people who either have reached the rank of Ambassador or Career Minister. They are excluded from receiving relief. Other African-Americans in the Foreign Service have been promoted at the same rate as whites or at a faster rate than whites. They do not get promotion damages, because they appear to be progressing by statistical measures.

THE COURT: Any of those 83 in the audience today?

MR. CONNELLY: I don't know, Your Honor.

THE COURT: Will any of those who are in the 83 that are going to get nothing stand up please.

Well, as I understand it, 274 out of 357 will get some form of relief.

MR. CONNELLY: Monetary relief.

THE COURT: Eighty-three will get no monetary relief. Are there any of the 83 in the audience today? They are going to receive no retroactive relief. There's nobody here in that category. That might tell us something.

How were those folks determined? How did you make those determinations? In other words, did someone go through there and say, these folks are not -- were not the subject of discrimination; is that what happened?

MR CONNELLY: That's essentially what happened with respect to promotions, Your Honor. What we did -- what we had our statistical experts do is we looked at the average time to promotion of white Foreign Service Officers. Then we compared each individual member of the class and their time to promotion. And when their name to promotion exceeded the average of the white Foreign Service Officers, they got relief. But if the time to promotion of the class member was equal to or faster than the white Foreign Service Officers, they did not get relief.

THE COURT: I got you. And that's the 83?

MR. CONNELLY: That's the 83, plus we have the Career Ambassadors and the Career Ministers who by our definition succeeded in the Department, and they do not get monetary relief.

THE COURT: Now, who made this decision? How was this done?

MR. CONNELLY: This was a statistical analysis.

THE COURT: I see. I mean, how did you agree on 83? Did you do that?

MR. CONNELLY: That was what the computer told us, Your Honor.

THE COURT: I see. And then spit out who they were.

MR. CONNELLY: It spit out who they were.

THE COURT: I see.

MR. CONNELLY: Your Honor, I'll just conclude briefly here.

THE COURT: No, that's all right. That's interesting. Go ahead.

MR. CONNELLY: We think the agreement on the retroactive side is a fair one because it's supported by the statistical and the anecdotal evidence that we had. Our consultants at Economic Research Services in Tallahassee spent thousands of hours assisting us. They did well over 100 separate statistical analyses. So it was that evidence that really guided us in our negotiations.

And I want to say the other key factor that we took into account in agreeing on retroactive relief was that that relief would get to the class now. I don't think anyone would dispute the proposition that if we could not settle the case, we'd be at this for a long time. That's certainly the case for the prospective relief and the injunctive relief as well. but this relief goes to the class now.

The Palmer case took 17 years to reach a conclusion and it was our judgment that the additional relief that we thought might be able to get if we litigated simply was not great enough considering the litigation risks to justify not settling on the terms we did.

THE COURT: Now, what about the four people who are not going to be reinstated. They'll get monetary relief?

MR. CONNELLY: Yes, they are all getting monetary relief, Your Honor.

THE COURT: You're saying that's not so?

MR. CONNELLY: They are.

THE COURT: No, counsel is shaking her head.

MS. HUTCHINSON: My client get no monetary relief other than -- he didn't get anything other than the termination and promotion damages, but it's not any separate monetary relief for not being reinstated, no.

THE COURT: No, no, no. My question was the four who are not going to be reinstated, they are going to get monetary relief; is that correct? You're not questioning that, are you?

MS. HUTCHINSON: Oh, yes.

THE COURT: You are --

MS. HUTCHINSON: My client wasn't considered for reinstatement. He was not considered for reinstatement.

THE COURT: No, I'm not asking that. The four who were not reinstated.--

MR. CONNELLY: That's correct, Your Honor. Eight people applied for reinstatement.

THE COURT: And the four who were not reinstated are going to get monetary relief?

MR. CONNELLY: Yes, sir, they are.

THE COURT: And in what sums? Do we know?

MR. CONNELLY: I can give you them, Your Honor.

THE COURT: Do you represent one of them?

MS. WATSON: Yes, I do, Mr. Odie Fields I think will receive something in the neighborhood of $14,000 in lieu of reinstatement.

THE COURT: Fourteen thousand.

MS. WATSON: Mr. Fields will be taking the stand.

THE COURT: I see. He's going to speak. Okay. So he'll get 14.

MR. CONNELLY: Your Honor, hopefully I can give you this fairly quickly as to how much each person who is not being reinstated is going to get.

All right. Robert Watkins is one of the four. He is getting a total of $152,000. Mr. Fields is getting a total in excess of $77,000.

THE COURT: Wait a second. He says he's getting 14. You say he's getting 77?

MR. FIELDS: For reinstatement.

THE COURT: I don't understand that.

MS. WATSON: For reinstatement he's saying he's getting $14,000. That's with the termination. The other money is from promotion.

MR. CONNELLY: What I have given you, Your Honor, is the total damage figure he is getting.

THE COURT: How much is he going to get?

MR. CONNELLY: He is getting in excess of $77,000.

THE COURT: I see. Go ahead. Who else?

MR. CONNELLY: Keith Buxton, I don't have the total here for him, but it is in excess of $21,000. And Ruppert Vaughn, I do not have the total for him, but it is in excess of $19,000. So those are the four who were denied tenure.

THE COURT: All right.

MR. CONNELLY: Your Honor, just in closing, we spent about almost three years negotiating this agreement. We think it has significant potential to change the working environment at State. If we didn't firmly believe in this agreement, we wouldn't be here today.

THE COURT: All right.

MR. BIRCH: Good morning, Your Honor. I want to make a few brief points and then we can do what the meat of the session is and that is listen to what the people have to say about the agreement who are affected by it.

When Mr. Sellers talked, he talked about the factors that this Court has to take into account in determining whether this overall agreement is fair. And two of those factors are the probability that the plaintiffs would win and the other was an analysis of the exposure if the plaintiffs would win.

Now, they have set forth what their analysis of the likelihood of their prevailing is, and I'd like to for the record, so the Court will know what our perspective is, set forth what we think would happen were this case to proceed. I don't want to do this to beat my chest as much as to put it on the record so that we'll know what a good deal this is for the Court to consider.

First issue, on class certification. As you know, Judge Revercomb denied class certification. He denied a reconsideration of class certification. While I hesitate to predict what you would do, we think the right thing for you

to have dome were that issue to be presented to you would to have been deny class certification, and that would have stopped the case dead in its tracks.

But let's assume that you would certify the case. On the issue of promotions, our statistician was prepared to testify that on analyzing the statistics between 1984 and 1994, the relevant time period, that there was no statistically significant disparity in promotions for African-Americans within the State Department. That's what our expert would have testified were we to have come to trial.

Therefore with no statistically significant disparity, the plaintiffs would have gotten zero dollars in relief. Even our statistician then did another analysis. That is he took what the plaintiff did as far as the shortfall and he compute that into money. And his analysis on the amount of money the plaintiffs would have gotten, had they succeeded on promotions was less than a million dollars.

Let's talk about canal assignments. Now, just to back up for a second you know, you're in the political cone and you're in the counselor cone and et cetera, et cetera. Our expert determined that there was no discrimination in that area. And, in fact, during the relevant time period, African-American were over assigned to the most prestigious cone. that is the political one.

When a college major and the degree that people took into account, there was no discrimination in canal assignments across the board. And that's what our statistician would have testified to.

As far as post and duty assignments, neither our expert and equally important the plaintiffs' expert came up with any statistical disparity on assignments to hardship posts or the good posts or anything like that. It just wasn't there.

As far as evaluations, again, there was no evidence by either party which demonstrated that the evaluation system was flawed.

Tenure, since 1984, only 11 African-Americans have been denied tenure. Now, obviously you could not have certified a class of 11 people, because of numerocity, so that would never have come before the Court. Of those 11 people, though, four of them are going to be getting tenure I note as an aside. But our expert would have testified that it's too small a sample to draw any statistical conclusions, and therefore, in our judgment there would have been no finding of discrimination based upon statistics in tenure.

Terminations. Latest statistician did come up with a number of terminations which they thought were excessive from a statistical standpoint. However, here is how she did it. She said anyone who left the State Department who was an African-American did so involuntarily. Well, obviously that's a felonious assumption because -- well, maybe not felonious, fallacious, fallacious assumption. I'm trapped in the criminal court, Your Honor, I'm sorry.

It's a fallacious assumption because people voluntarily resign. Our statistician did the same analysis and took into account the people who voluntarily resigned, and came up that there was no statistical significance. But he ran another analysis. He accepted the plaintiffs' numbers and he tried to monetize that and he also came out with less than a million dollars.

Our analysis, assuming that the plaintiffs are right on the numbers was that the total exposure of the government in this case on a monetary system was about a million and a half dollars, which is what Mr. Sellers told the Court. So were we go to Court, we think we would have one, assuming the Court would have certified the case.

That leads to my next point, Your Honor. We're settling this case, not because we are deathly afraid of losing the case, because we think had it been presented to the Court, we would have won it. Or we would have had a good chance of winning it. We're settling the case for the same reasons that the plaintiffs said they're settling it. We want to make the State Department a

better place to work. We want to end any discrimination that may have been going on. We want to put this behind us. We don't want another 10 years worth of litigation. We want to settle the case and improve the State Department.

THE COURT: As I recall lurking in all these papers I've read, there are a few little things that seem to me make some sense which you seem to be opposed to. For example, there was some talk about having this Counsel for Equality in the Workplace meet with Secretary. Why would you be against that?

MR. BIRCH: Well, there are two answers to that, Your Honor. The first is I cannot change the terms of the consent decree. It's been approved at the highest level of the State Department.

THE COURT: You could tell me that the Secretary would agree to do that?

MR. BIRCH: Well, I cannot put that into the terms of the consent decree. I am perfectly willing to present to the Secretary of State any recommendations that this Court would make outside the consent decree.

THE COURT: I see. I mean, it seems to me that -- well, I have not seen Mr. Christopher in many years, but in one of my prior careers I used to represent people on the other side, and I know he's a reasonable person. I'm sure he would meet with -- he would reach out to meet with his counsel. That's why I don't understand why that should be objected to.

MR. BIRCH: Well, there are two answers, Your Honor. There is the formal answer and that is --

THE COURT: It's in the decree. All right.

MR. BIRCH: No, it's not actually in the decree.

THE COURT: It's not in the decree.

MR. BIRCH: But the other answer, and that's the answer which I'm trying to reach out to you is is that if you have some suggestions outside of the decree as to how you think the Secretary might want to act. I'll be glad to pass those on to the Secretary.

THE COURT: I got you. All right. What was the other one? These four people that are going to receive reinstatement, will they be required to begin their careers again with no tenure or seniority? How will that work? Will they be able to pick up where they were?

MR. BIRCH: They will -- the answer is they're going to have to go back in one sense, but not go back. Let's talk about the pay. These people were FSO-4 level employees at various steps within the State Department. And obviously when they left the State Department at various times, they were earning X dollars.

When we bring them back, we're going to bring them back basically at a much higher pay level within the FSO-4 level And that could go -- let's say the person was an FSO-4. Well, over the period of time that person has gotten another job, and they're making more money. If, in fact, they're making more money, we're prepared to bring them up to the FSO-4 step 14 level.

THE COURT: I got you.

MR. BIRCH: Now, we won't want to bring them in as FSO-5's because, frankly, that doesn't help them, because that makes them more liable for the various career -- actually it's 3, because it goes upward.

THE COURT: So, you're saying the will have certain -- they'll have the FSO-4 tenure?

MR. BIRCH: No, because the whole question for tenure is whether you get tenure. So you can't say you're going to get tenure, when, in fact, what they're being brought for is another opportunity to secure tenure.

THE COURT: Well, how would they get that?

MR. BIRCH: Well , they're going to perform in the State Department. They're going to be given the training of the person. They're going to start off with a class, and they'll be given another shot at seeing whether they do make tenure. We're not guaranteeing anybody anything.

THE COURT: I know. During what period of time will they be given this --

MR. BIRCH: I think it's a five year time period, Your Honor, that they have it.

THE COURT: Suppose they've already met that five year --

MR. BIRCH: They haven't. By definition, these people are people who were denied tenure.

THE COURT: I see.

MR. BIRCH: So the pool of people from which these people were selected already fit --

THE COURT: I see. So in other words, they have not already spent time in this position?

MR. BIRCH: But let me make an important point. We're not going to count any of the previous time against them. They're starting off fresh.

THE COURT: But will that time be counted for them?

MR. BIRCH: It will count for purposes of their pay. It won't count for purposes of their career.

THE COURT: Well, does that mean they have to start the five year period over again?

MR. BIRCH: Oh, yes. That's the whole benefit of it. See, they want that.

THE COURT: Well, is it a benefit or detriment.

MS. WATSON: It's a detriment.

THE COURT: I don't understand. In other words, let's suppose they spent their five years, and they were denied.

MR. BIRCH: The additional five years, yes, Your Honor.

THE COURT: And now under this system, they go back and it's day one. In other words, before they can come up for tenure again it's got to be five years?

MR. BIRCH: Well, whenever the tenure board would meet, they would be considered. It's not necessarily five years. They could be considered for tenure during the time that a normal Foreign Service Officer. We're not going to make them wait any longer than normal beginning Foreign Service Officer would have to wait.

The point is they're going to be treated exactly like new Foreign Service Officers and given a new fresh opportunity to compete for purposes of making tenure.

THE COURT: Well, at some point I want to hear my committee on this. I don't think you want to do it now, but I will hear from you on this. All right? Because you might know - just keep that in mind.

Let me see what other points I had here. Some of these findings, these reports that are filed, there was something in here that indicated they get filed with counsel but not with the Court. There's no objection to filing them?

MR. BIRCH: I have no problem with it. Also, with the plaintiffs filing whatever reports we give them with the Court.

THE COURT: Okay. I didn't think there would be any.

MR. BIRCH: They are going to be -- you know, whatever we give them, if they want to file with the Court, that's fine.

THE COURT: What about this increased diversity training. Nowhere in the decree does it require that such training be mandatory for supervisory personnel.

MR. BIRCH: Actually, that's a misunderstanding. It is mandatory for supervisory personnel.

THE COURT: It is mandatory. It will be mandatory. All right. I'm just going through these notes.

MR. BIRCH: That's fine. That's what we're here for, Your Honor.

THE COURT: The same thing with statistical analysis, you would have no objection if the plaintiffs filed those with the Court?

MR. BIRCH: No, Your Honor.

THE COURT: Okay, And the plaintiffs have no problem filing them in Court, right?

MR. SELLERS: No, Your Honor.

THE COURT: Okay. The four and five years of the decree, that's substantive I would imagine. Some seem to -- I guess that was just mentioned here, the difference between four and five years. What's the significance of that?

MR. BIRCH: Obviously that's a subject of negotiation between the parties. And to cut the story short, I think they were at eight and we were at two, and then they were at five and we were at three. And we settled at four. It's a settlement like any other settlement where we want to do less and they want to do more, and the parties work it out over time.

THE COURT: I see. And they had no opportunity to go to Miami; is that it? That's a joke.

MR. BIRCH: I think that's a seven year agreement actually, Your Honor. And I tell you $98 million is amazing: isn't it? We didn't offer them that opportunity and they didn't request it.

THE COURT: All right. It says it's four or five, but that -- all right. Let us take -- I gather we're ready to hear from the -- oh. you want to be heard?

MS. WATSON: Yes, sir.

THE COURT: I'm sorry. I thought you'd been heard, but that's all right.

MR. BIRCH: Your Honor, unless you have any other questions?

THE COURT: No. Go ahead. Let me finish counsel. Then we'll take a recess and come back and hear -- start our hearing from the people. Go ahead.

MS. WATSON: Your Honor, I've spent quite a bit of --

THE COURT: That's right. I didn't hear from you. I forgot.

MS. WATSON: I only have a couple of comments to make, and one is in response to class counsel's comment that this has been a three year settlement negotiation, but I would only note to the Court that the best and final offer was submitted and agreed upon sometime in February of 1995. My question is what has happened since then?

There has not been any significant change in the settlement agreement, although up until January, 1996, the plaintiffs and the interveners as representatives of the class disagreed and disapproved of that settlement agreement.

The other comment I would make was the one which said that 97 percent of the damages go to those who were discriminated against. But I would note to the Court that 35 percent of the overall amount in this settlement goes to plaintiffs' lawyers who, you know, my clients feel have not represented them.

THE COURT: Now, I'm confused. Out of the 3.8, how much of that goes to the lawyers?

MS. WATSON: Out of the 5/9.

THE COURT: So in other words, that's what I thought. It's 3.8 is going to go --

MS. WATSON: That's right. And 97 percent.

THE COURT: That's going to hit the road.

MS. WATSON: That's correct.

THE COURT: But I think you will agree if there has ever been a case where those are reasonable fees, I don't know what other case there would be. I forgot what their hourly rate is, but it is nothing like what they -- what is the hourly rate on the fee?

MR. CONNELLY: Your Honor, it works out to $30 and hour.

THE COURT: Thirty dollars and hour. So I don't think there is much complaint in that.

MS. WATSON: Well, Your Honor, this was taken as a pro bono case. But we won't argue. I just wanted to point that out to you.

THE COURT: I understand pro bono, but I think we ought to get that out on the table. The fact is that to ask a lawyer to work for years and years and years on a matter and receive no compensation, I think that's asking too much. I don't think we ask of anybody else in our community -- lawyers are entitled to make a living. You know that.

MS. WATSON: Certainly, Your Honor. Certainly, and we're --

THE COURT: Thirty dollars an hour, I do think -- the one thing I was very impressed with in this case was the fact that the plaintiffs' lawyers were receiving less and hour than the government lawyers which is hard to justify. Are you going to say you don't get $30 and hour?

MS. WATSON: Barely. Just about.

MR. BIRCH: I'm not getting seven years and -- we've already established that.

MS. WATSON: No, they make a little more, $35 or $37 an hour. But we wouldn't mind paying if this were a fair and equitable settlement. Your Honor, and that is what we're against.

THE COURT: Well, I do think that I do think that anybody is going to complain about the legal fees in this case. I think if they do -- all right. So the 3.8 million is going to go right to the bottom line. That's going to go right into --

MS. WATSON: That's correct.

THE COURT: It's going to go right to the people that should receive it. All right. Now, --

MS. WATSON: Well, we'd like to see the statistical analysis of who is going to receive what?

THE COURT: Let me hear that one again. You don't know who is going to receive what?

MS. WATSON: That is correct, Your Honor.

THE COURT: Is that some figures that somebody has and could share with her?

MS. WATSON: That's correct. We have not had the advantage of those.

MR. CONNELLY: Your Honor, it's an appendix to the consent decree. It shows exactly what each person will get.

MS. WATSON: I haven't seen the one that shows Mr. Fields getting --

THE COURT: We're not talking legal fees. No, no, you've defended the legal fees. What we got to get is how are you going to whack up the $3.8 million. How are you going to allocate it?

MR. CONNELLY: Every class member has received an individual letter setting forth the exact --

THE COURT: Do you have a --

MR. CONNELLY: Yes.

THE COURT: Why don't you give it to her and then that will take care of one of the objections.

MS. WATSON: Then the other has to do with the affirmative action plan. We have not seen any evidence of an affirmative action plan as part of any of the prospective relief from the State Department.

THE COURT: Well, let me just -- the first one is the allocation. Is that what you want?

MS. WATSON: That's correct.

THE COURT: And you'll receive that, right?

MS. WATSON: Right.

THE COURT: And the second one is the affirmative action plan?

MS. WATSON: That's correct.

THE COURT: And what haven't you received?

MS. WATSON: To my knowledge it hasn't been submitted to the Department of State. Mr. Kirkland mentioned that he had reviewed that as part of the prospective relief. We have yet to see that, and would like to see it if one has been submitted.

THE COURT: Who has the affirmative action plan? Is there such a thing? Mr, Kirkland, have you seen such a plan?

MR. BIRCH: Your Honor, I can address her comments when she's finished talking because I have a few comments on what she has to say.

THE COURT: But is there such a plan?

MR. BIRCH: Sure.

THE COURT: And can she see that?

MR. BIRCH: Of course.

THE COURT: Where is it?

MR. BIRCH: We can get a copy to her tomorrow.

MS. WATSON: All right. And I had one --

THE COURT: Well, should I see a copy of it. I mean, I know the government once told me I couldn't sign something with my own pen, but I could at least see the plan to see what I'm approving or is that something I'm not approving?

MR. BIRCH: There's no problem getting Your Honor a copy.

THE COURT: Well, could one come over by noon? Could someone call and get it over here? I can't go into tomorrow. That's the problem. I got to get back to my other case.

MR. BIRCH: I'm sorry, Your Honor?

THE COURT: Could someone call? There's a phone here. If they could call and see if they can get it over here by noon.

MR. BIRCH: We can see if we can get it over here. In fact, we have had the Department of State EEO Office --

THE COURT: Do you have the plan?

MS. DAVIS: No, I do not have it with me.

THE COURT: All right. We'll get it.

MR. BIRCH: She's the head of the program, so she's the one we'd ask.

THE COURT: All right. So the affirmative action plan will be sent to us. The allocation of the money. Now what else do you --

MR. CONNELLY: Your Honor, on the allocation of the money, one thing I should have mentioned is there are some privacy concerns among some individuals.

THE COURT: Well, could you do it by letters and amounts rather than give their name? That would satisfy you?

MS. WATSON: That would satisfy me, but with respect to the 16 persons that I represent, I would like to have their name reflected inasmuch as we feel --

THE COURT: Absolutely. There's no question about that. You're their lawyer, and I assume you can waive their privacy rights.

MS. WATSON: That's correct. Then with regard to an injunction that the prospective relief section of the proposed consent decree addresses, if it becomes necessary for an injunction to be issued, it's not clear from looking at the document who issues the injunction, the Secretary of State or this Court. So perhaps --

THE COURT: Well, how does the Secretary issue and injunction?

MS. WATSON: I have no idea. It's unclear in the proposed consent decree.

THE COURT: Unless he becomes a judge.

MS. WATSON: Well, Your Honor, your role in this is --

THE COURT: No, I mean, we'll make him a judge.

MS. WATSON: Well, perhaps.

THE COURT: Where is the decree, and we can read it. Do you have a copy of the decree, John? What's the item in the decree?

MR. BIRCH: It's page 11, Your Honor, is the injunctive relief, Paragraph Roman IV(c).

THE COURT: Let me just read it here.

MR. BIRCH: And you're the one who signs it, Your Honor.

THE COURT: Let's see. The Council may request?

MR. BIRCH: No, it's Paragraph -- page 11 of the consent decree, down at the bottom Paragraph IV(c).

THE COURT: Let me just look at it. Well, I'm on a different page 11 than you are. Oh, (c), injunctive relief. I'm sorry. Boy, this is pretty --

MR. BIRCH: It says the Department reaffirms its obligations and commitments to ensure equal employment opportunities and commitments to ensure equal employment opportunities for all employees. The Department shall not discriminate on the basis of race in promotions, awards, tenuring, terminations, performance evaluations, selection out, pot and duty assignments, conal assignments or training. The Department shall not retaliate against a class member for his or her participation in equal employment activities. This is as broad injunction I've ever seen.

THE COURT: No, I understand that. But I'm just trying to see how that gets implemented.

MR. BIRCH: You sign it, Your Honor.

MR. SELLERS: No, no. I think, Your Honor, if I may --

THE COURT: There's got to be more of an order. Where is that?

MR. SELLERS: The provision -- there is a provision in here that indicates that if we believe there has been a violation of any term under the agreement, we provide the Department's counsel with notice. We'd have an opportunity to discuss it and if -- I've forgotten the time periods --

THE COURT: Where is it? What provision is that?

MR. SELLERS: Just a second.

MR. BIRCH: Your Honor, that's on page 40.

THE COURT: 40?

MR. BIRCH: Paragraph (d) or 5. And it's (c)(1). and it says either party claiming that a dispute exists regarding --

THE COURT: Any issue under this decree shall --

MR. SELLERS: It continues on to 41.

THE COURT: That does it.

MR. BIRCH: It says petition the Court for appropriate relief. So it goes to you. Your Honor, let me make a few brief comments in response to this.

THE COURT: And page 42, (7) gives the Court to retain jurisdiction.

MR. SELLERS: Correct.

MR. BIRCH: Yes, Your Honor.

THE COURT: Preliminary approval. That mean it dates back to earlier date, right? Okay. Let me just quickly -- I've got to get counsel. She has not finished.

MS. WATSON: Yes, I'm finished.

THE COURT: You should have it by now. The affirmative action plan will be delivered here by noon today, or by 2:00 o'clock when we resume our hearing. And you're satisfied, I assume, with the injunction?

MS. WATSON: Yes, I wanted it to be clear the Court was the one that --

THE COURT: Yes, well, it says it. What it is is there is a conciliation period which I don't see any problem in. In other words, if somebody has a -- says that it's been violated, this decree, they have to notify the other side, and then they have to discuss it for a period of time, and then that person can come into -- the plaintiff's counsel can come into Court and say it's been breached. And I will retain the jurisdiction.

MS. WATSON: All right. Thank you.

THE COURT: Well, now you've been helpful. Is that the --

MS. WATSON: That's it, Your Honor. Those are all my comments aside from what I've already submitted for the record.

THE COURT: Well, I'd like to know what your bottom line is now that you have our --

MS. WATSON: The bottom line is that this is not a decree that is fair and equitable for the named plaintiffs as class representatives, nor for the class inasmuch as there is no indication that there will be prospective relief that will eliminate the kinds of discrimination that has been systemic within the State Department as regards black Foreign Service Officers.

THE COURT: So you're really concerned with the prospective relief? Is that your concern?

MS. WATSON: The prospective relief as well as the relief which redresses the discrimination that's been suffered by the plaintiffs that --

THE COURT: The retroactive relief?

MS. WATSON: Retroactive as well as --

THE COURT: Let's look at the prospective relief. In the prospective relief, what you're going to have, you're going to see the plan. You're going to -- there is going to be statistics to monitor what's going on. And you have the right or counsel has the right if they feel those statistics show a pattern of discrimination that they have to get it corrected or else come into Court.

And you have a Secretary of State that I assume would agree is not a person who would tolerate discrimination. Maybe I'm wrong, but as I say, my prior knowledge of Mr. Christopher is he's not a person -- he's a fair-minded person.

MS. WATSON: That's right. And then we may have another Secretary of State. We don't know that.

THE COURT: Yeah, you might have one. We don't know what's --

MS. WATSON: Well, whether he decides to keep the position, you know.

THE COURT: No, I know. But he or whoever -- I'm sure --

MS. WATSON: Regardless, Your Honor, what we're interested in is having some role on this review panel Council for Equality in the Workplace involvement by the members of the representative plaintiffs, and there is no role. You would note that there are union representatives and various other persons, but none where our plaintiff representatives are involved.

THE COURT: One of the questions is is there any outside person on that Council for Equality or is it all internal, Mr. Birch?

MR. BIRCH: There has been no outside person appointed by the Secretary to the Council.

THE COURT: Is that another thing I could just ask or request?

MR. BIRCH: Yes

THE COURT: And if you had an outside person, would that meet your objection?

MS. WATSON: Representing he plaintiff interveners and --

THE COURT: Well, --

MS. WATSON: -- representatives of the class, yes. But not ones that are wholly recommended by the Department of State.

THE COURT: How many are on the Council.

MR. SELLERS: Eight.

THE COURT: Eight? All right. And the past, of course, -- now, thank you. You've been helpful.

MS. WATSON: Then the other thing, Your Honor, is with regard to the prospective relief, I have to note that this case has been brought to coincide or dovetail with the settlement and the prospective relief in the Palmer case, and I have failed to see anything specific that is not reflective of the Palmer case specific to the case that was brought by the black Foreign Service Officers, and we feel that that was an unfair process that was engaged in. Because the consent --

THE COURT: I don't see what you're saying. You're saying it's unfair in what way?

MS. WATSON: The consent decree came in with prospective relief that is full of the settlement achieved in the Palmer case.

THE COURT: In other words, they borrowed from the Palmer case?

MS. WATSON: They are merging the two together.

THE COURT: Why does that bother you?

MS. WATSON: Well, because it does not address the concerns of the black Foreign Service Officers, and it shows a lack of consideration for the individual circumstances of the plaintiffs and the class in this case.

We should also note that with regard to certification of the class, and there was a lot of talk about the class not being certified and the two prior denials of class certification. You may recall Your Honor asked that the motion for class certification be submitted, and that was not done. Now, we're faced with the comment that it wouldn't have happened anyway. Well, we would like to have tried it, and it did not occur. Counsel for the plaintiffs at that time did not file such a class certification motion.

THE COURT: I see. Okay. Thank you.

MS. WATSON: Thank you.

THE COURT: Just one more. Let me get -- I'll hear you again, but I haven't heard from her. Even though I saw you before, go ahead.

MS. HUTCHINSON: Your Honor, we believe this decree should be rejected, an I'm representing the individual interest of Mr. Thomas and Mr. Alan Latimer, and I will speak to some of their concerns, but also speak to some of the general terms.

The basic problem with this consent decree that has been filed with you for approval is that the decree attempts to move forward and resolve this case as a 23(b)(2) class action. However, the decree contains on page 8 a provision for individual relief and seeks to settle individual claims of individuals who have not consented to have their claims settled.

It is almost a basic principle that you may not settle someone's individual claim without their consent. On that premise alone, this decree is deficient.

THE COURT: Well, as I thought that that's going to be an open issue.

MS. HUTCHINSON: No, no. On page 8, it is entitled individual relief. It is not an open issue if this decree is approved.

THE COURT: Well, it's open in the sense, the opting out is an open issue.

MS. HUTCHINSON: Well, but that is not the issue. The issue is this provision says individual relief. It does not, it does not say that it is relief of some general nature. It says individual relief.

THE COURT: No, I understand that. But when I'm saying is if somebody out there says that they want to opt out, I will retain jurisdiction for that. They then will come in here and say, we opted out. And then that legal issue will be determined by me.

MS. HUTCHINSON: But as at this point in time, if this decree is approved by your, I don't know that legally those plaintiffs would have standing that didn't agree.

THE COURT: Well, I thought that that's -- isn't that agreed that that's an open issue?

MS. HUTCHINSON: No, sir, it is not.

THE COURT: Well, let me just ask counsel here: Is that agreed that that's an open issue?

MR. BIRCH: I'm very confused by what she's saying, Your Honor. I mean, you know, first off the issue -- no person has moved to opt out, and when they do move, we'll oppose it.

THE COURT: You'll oppose it, but you agree that's an open issue?

MR. BIRCH: Yes, If a plaintiff move to opt out, we will file an opposition, and you will decide whether or not the person can opt out.

THE COURT: Now, if my approval -- I can put in that says the issue of opting out is an open issue and has not been determined by this Court.

MS. HUTCHINSON: Okay.

THE COURT: And the parties will have the right to file a -- and the Court will retain jurisdiction to consider any individual claim and the legal issue as to whether they have the right to opt out on this decree. I think you make a good point. I can't prejudge the matter, because it's unfair to the government. But I do think you make a good point when you say the people's individual rights are not to be determined if they opt out of an agreement.

MS. WATSON: Well, then that would have to be the way this decree is currently approved, because it couldn't be approved as it stands and as it's written. Page 8 says it's individual relief. The people have not consented to accept this relief. These people have not consented to accept this relief, and if this is approved as a 23(b)(2) it would be attempting to settle their individual claims to which they did not consent.

We say to the Court that it is impossible --

THE COURT: Would you give me -- would you submit to me language which I can put in my decree accepting which would say --

MS. WATSON: Yes, sir, I certainly would.

THE COURT: Which will say that that issue in as strong a terms as I can after both parties see it would say that that issue has not been resolved, and their rights, the rights of anybody who may opt out will be subject to a determination upon a motion -- an appropriate motion being filed with this Court.

MS. WATSON: We would submit that language, but we would also not waive our position that you cannot and the decree is deficient in that it proposed individual relief which --

THE COURT: No, I understand that, but I do think that the -- we ought to get some language which I believe I have the right to put in my decree as to what -- I can put something that interprets my own decree.

MS. WATSON: I don't know.

MR. SELLERS: Your Honor, can I just make the position of plaintiff's class counsel clear on this. We agree that the decree is silent on this issue. We have agreed in the course of negotiations not to take a position on whether opt out is available.

THE COURT: And I'm not going to take a position in anything I sign that -- a definitive position, but I can take a position that says it's an open issue which is what I understand that the parties have agreed to; is that right, Mr. Birch?

MR. BIRCH: I would like to expand on that when it's my turn.

MS. WATSON: I think that will be difficult in that in --

THE COURT: Well, you're going to give me language.

MS. WATSON: Yes. I'll give you some language, but I think that there will be problems with that.

First of all, we do believe that when a party who is a party plaintiff does not agree to settle their claim, that their claim cannot be settled by a consent decree regardless of who it is, and that their claims could and should be severed, and that they should not be part of the decree.

THE COURT: Well, isn't that part of the same thing you just argued?

MS. WATSON: Yes. Then in terms of the relief that's proposed the prospective relief, we do not believe that the relief resolves the problems of promotion and the assignment system that plaintiffs had raised that had affected minority Foreign Service Officers. That the actual injunctive relief is deficient in that it doesn't actually address the promotion system.

What it does is it provides for monitoring, but the problems which will be outlined by testimony deal with the fact that the defendant has a subjective promotion system that is not being cured by the injunctive relief proposed here.

As Mr. Kirkland said, he did not look at those aspects of the system. It is not addressed by this decree. the other process that's not addressed by this decree at all and we believe makes the decree deficient and objectionable and should be rejected is the assignment system. It does not have any cure of the assignment system that the defendant now uses to assign individuals to positions which then determines their promotability in the future. There is nothing in this decree that addresses the assignment system of the defendant.

THE COURT: Well, you think you could have something that would prevent the Secretary of State from making assignments?

MS. WATSON: No, the assignment system the use for people to get assignments. The assignment system is a bid process by which -- and as I said, some of the testimony will address that. It is a bid process that individuals bid on, and

those assignments ultimately affect their promotability. There is nothing in this decree addressing that. That was part of the claims that were brought.

THE COURT: What is your suggestion on that?

MS. WATSON: My suggestion is that the assignment system should be redesigned. They did not look at that. As Mr. Kirkland testified, that was not looked at by him or anyone else that I know of, and there is nothing in this decree that covers it. I mean, I think we could sit down and do that but I mean --

THE COURT: Why does this decree have to cover that? Can't that be done outside this decree?

MS. WATSON: No, unless the defendant would voluntarily seek to do that.

THE COURT: Well, I don't think that this action was designed to just restructure the whole State Department.

MS. WATSON: This action attacked the assignment system as it affected minorities, and I believe you will hear that, and you'll hear it specifically from Mr. Latimer. So it did address that problem.

In terms of the retroactive relief and the reinstatement, Mr. Thomas, my client, specifically is excluded from an opportunity for reinstatement by this decree, and so that we would say that the decree should be rejected. In terms of the reinstatement, there were others who might have wished to have reinstatement or apply for it, but because the terms of the decree excluded and limited reinstatement to the non-tenured employees, tenured employees were totally excluded. We think that's unfair. It makes the decree inadequate.

The promotion damages, we believe those are inadequate, because in terms of the way the analysis was done, individuals were compared with not their peer group, and the State Department has what they call class. You come in with a certain class, and based upon your class, you know, those are the group of people that are your counterparts.

Well, they just compared them with the generic group overall. We feel that was deficient, and so we would ask the Court reject this decree. We don't think that it remedies the promotion assignment and termination complaints that the plaintiffs sought when they brought this action.

THE COURT: All right. Thank you very much. Now, you wanted to respond quickly?

MR. BIRCH: Yes, I do, quickly, Your Honor.

THE COURT: All right. Go ahead.

MR. BIRCH: I wanted to make a few points in response to the comments made by Ms. Watson and Ms. Hutchinson if I may. You'll notice that the thrust, the broad thrust and it's clearly understandable is they said we want more relief. I think they have not given you any analysis that were they to try the case they'd win on those issues.

Plaintiffs always want more relief. The government always wants less. This is a settlement. This is the meeting of the minds. Nobody won and nobody lost. Let me talk about the attorneys fees issue, and I just want to make one point. I don't want to argue it, because I know the Court understands it.

We made a settlement offer --

THE COURT: There is one thing that is clear in my mind is that the attorneys fees are reasonable. But go ahead. If you want to dissuade me of that --

MR. BIRCH: No, no, I'm not trying to dissuade you I'm trying to make a different point. The plaintiffs are working as if there is an assumption that there is a total pie of 5.9 and that the plaintiffs attorneys took 2.1 of that. That wasn't the way it happened. We offered a settlement of 3.8 plus 2.1 in attorneys fees.

THE COURT: I got you.

MR. BIRCH: So the lawyers aren't ripping off the clients. It's two completely different pieces of the pie. That's how the settlement went down.

THE COURT: There is no ripping off here.

MR. BIRCH: As far as the Palmer and the Thomas case, unfortunately Ms. Watson wasn't there, and she didn't know that they were actually settled together. So it's not a question of us lifting wholesale the Palmer terms and putting in there. She just wasn't there when we negotiated them together.

Let me talk about the opt out issue and try and refine my remarks. I, frankly, am surprised that we haven't seen any motions to opt out now. Because, frankly, they should have been filed already because this is a fairness hearing, and the Court should have been in a position to decide them. I don't think that you can do what you're suggesting. But let me suggest an alternative.

If anyone wants to opt out, I think they should file such a motion, and I think the government should have the opportunity to oppose such a motion. I don't think you should sign the fairness decree until you've also decided what you're going to do in opt out. Let me give you an example.

Mr. Thomas under the consent decree is designed to get $74,000. Well, you can't sign the fairness decree which gives him $74,000 and let him op out.

THE COURT: In other words, what you're saying that because -- I think you make a good point. Because there's been some discussion of the possibility of opt out that before I sign this decree that I will give 30 days or 60 days with respect to any person that wants to opt out, and that I will then hear their motion to opt out. Is that what you're saying?

MR. BIRCH: I'm not sure it needs that much time, Your Honor, because they've already gotten the --

THE COURT: Well, I do think -- we've got people all over the world.

MR. BIRCH: But they've already been contacted -- I would suggest two weeks is more than enough time. But let me make another suggestion, Your Honor.

THE COURT: I think two weeks is too short.

MR. BIRCH: I am very concerned that the people who are considering opting out are getting bad information about what happens. Now, you will recall when we had the preliminary approval hearing, you said, look. I'm not going to guarantee you a lawyer. And you also said, you're going to have to take discovery. And you also said, you're going to have to take discovery. You're going to have to try the case against the government, et cetera, et cetera. People out there don't know that. And the reason I know that is because Ms. Hutchinson when she alluded to it said she wants you to appoint an arbiter to decide whether they should do it, and that isn't the way it works, Your Honor.

THE COURT: And they'd have to prove discrimination.

MR. BIRCH: So my concern is --

THE COURT: Understand what I'm saying?

MR. BIRCH: Absolutely, Your Honor.

MS. HUTCHINSON: Could I respond to that, because I never informed any individuals of anything.

THE COURT: You'll get your -- look, one thing everybody is going to get is the opportunity to respond to whatever else they're going to respond to it, as long as they do it before the end of the day. But go ahead.

MR. BIRCH: Okay. My point is, Your Honor, I don't want to have a whole other mass mailing. I think the word has gotten out. I clearly don't want to delay this process unnecessarily.

THE COURT: No, I understand that. But as you know, this is an important issue, and Ms. Watson is right in the sense that the law I think is pretty clear. And I think there has been a case in the Third Circuit recently on this point on opting out.

And I do agree with you that I think the preferred way to do it if it's not the only way is to do it the way you suggest.

MR. BIRCH: I think you have to do them at the same time, Your Honor.

THE COURT: So what I need is I'm going to need some suggestions. You've been helpful. Get me something -- maybe you can draft it up over noon as to what kind of notice I have to send out so that that issue can be considered.

MR. BIRCH: I don't think you need notice, Your Honor, and we would oppose another mailing.

THE COURT: But I got to give some notice that the people will have this opportunity. Otherwise, they're going to be forever bound. I've got to give some notice.

MR. BIRCH: I think the fairness notice that went out was the appropriate one, and we would oppose vigorously another --

THE COURT: Well, wait a second. I can ask you and the State Department, you got E-mail and every other kind of mail is to get something on that machine out to these people and say, look, you'll be given a certain period of time. The judge wants to know if you intend to opt out and wants you to be heard about opting out.

Then I'll have to decide that, right, before this plan gets final? Is that what you're suggesting?

MR. BIRCH: Ultimately, I think you have to decide them together, Your Honor. You can't decide one and then the other, because they're really intertwined.

THE COURT: Well, I suppose I say, okay, I've now received five people who say they want to opt out.

MR. BIRCH: Not who said they wanted to, but who filed a motion to opt out.

THE COURT: Have filed a motion. I will therefore say the decree is not effective as to everybody but those five people, and that those five people will not proceed -- their case will now proceed individually and I'll give them certain dates. Is that what you're suggesting?

MR. BIRCH: Yes, but I'm suggesting that, but let me read you part of the notice that you sent out, Your Honor, just to clarify that it's already happened in my opinion.

The consent decree does not provide for the right of any member of the plaintiff class to opt out of the consent decree. The court has expressed its intention to decide whether the right to opt out exists and if so, to whom it may apply. Accordingly, if you have any interest in opting out of this settlement, you must file with the Court by June 11, 1996, a statement of such interest and the reasons why you wish to opt out of the settlement.

THE COURT: Is that in there?

MR. BIRCH: Yes, it is, Your Honor. You've already sent out the notice.

THE COURT: But I think some people have said they want to opt out.

MR. BIRCH: No one has filed a motion to opt out.

THE COURT: No, but I think there is something in the papers I saw that people said --

MR. BIRCH: There is two categories. Some people checked the block. I don't know what the checking the block mean, Your Honor.

THE COURT: Look, we got to lean over backwards in this thing. Somebody has checked the block to say they want to opt out, that's good enough. I don't know what more they have to do.

MR. BIRCH: Your Honor, the Court has an obligation to --

THE COURT: I mean if we sent them a form that says check if you want to opt out, and they check and you say that's not good, I don't --

MR. BIRCH: We didn't send them forms. I don't know where these forms came from. They certainly weren't created by class counsel, and they weren't created by the government. Who knows where these forms came from.

THE COURT: Well, where are these forms? I saw something here.

MS. WATSON: In fact, I think another notice is appropriate because this notice never informed these people of that option. It didn't give them that option.

THE COURT: No, I thought he just read it?

MR. BIRCH: I just read it.

MS. WATSON: He said the Court will decide it, but it didn't tell them --

THE COURT: No, read -- have you read it?

MR. BIRCH: I'll read it again, Your Honor. The consent decree does not --

MS. WATSON: I've read that, Your Honor.

MR. BIRCH: Let me read it again, because it's right there, Your Honor.

THE COURT: Yes, read it again.

MR. BIRCH: You know, I -- the consent decree does not provide for the right of any member of the plaintiff class to opt out of the consent decree. The Court has expressed its intention to decide whether the right to opt out exists and if so, to whom it may apply. Accordingly, if you have any intention to decide whether the right to opt out exists and if so, to whom it may apply. Accordingly, if you have any interest in opting out of settlement, you must file with the Court by June 11, 1996, a statement of such interest and the reasons why you wish to opt out of this settlement.

Let me continue if I may. Be advised, however, that the Court has not yet determined whether you have such a right to opt out, and the Department of State has argued to the Court that it doesn't have the authority to allow opt outs from the consent decree. Barbara B. Hutchinson and Theresa Watson, counsel for 20 named plaintiffs, have argued to the Court that it does not have authority to allow opts outs from the consent decree. I read that wrong. It does have the authority.

If you are allowed to opt out of the settlement, you will have the opportunity to present your individual claim of discrimination to the Court, but you will give up any right to relief under this consent decree, and you will have to retain your own legal counsel or if you lack sufficient resqurces, apply to the Court for the appointment of counsel rather than rely upon class counsel to represent you.

And I continue. You must understand that since this is a civil case, the Court is not obligated to appoint counsel for you. Any appointment of counsel will be at the discretion of the Court. In bold language, even if you file a statement expressing your interest in opting out of the settlement, however, you must still comply with any procedures that apply to you as set forth in Exhibit F of the attached consent decree to protect your interest. I don't think we need any further notice, Your Honor.

THE COURT: I think that's a pretty good -- who wrote that?

MR. BIRCH: She did.

MS. WATSON: We all did.

THE COURT: Oh, you wrote that?

MR. BIRCH: They did.

MS. HUTCHINSON: But I think that --

MR. BIRCH: They wrote it and gave it to us. That's their language.

THE COURT: I think that's pretty good language.

MS. HUTCHINSON: But the actual thing that they sent back did not have any kind of indication of how they would do that other than file objections.

THE COURT: I understand that, but --

MS. HUTCHINSON: I think that it's really important to send another notice.

THE COURT: No, no, no. Let me ask you this question. You have received a certain number of opt outs, have you not?

MS. HUTCHINSON: Right.

THE COURT: And why can't we accept those as being -- I don't know what more you can ask those people if they wrote and said they want to opt out.

MR. BIRCH: Your Honor, may I --

THE COURT: I don't think they can be ignored.

MR. BIRCH: Your Honor, let me consult with my client and I'll address it first thing when we start this afternoon.

THE COURT: Okay.

MR. BIRCH: I mean, I think the Court's raised a legitimate question that I'd like to talk to my client.

THE COURT: I mean, if we told them to do it and they had a form and it says -- and they checked that form --

MR. BIRCH: I'll talk with my client, and I'll get to you first thing this afternoon.

THE COURT: And maybe go back to them with a second notice saying now that you've opted out, you've got to now come in and --

MS. HUTCHINSON: Right. I think that's appropriate.

MR. BIRCH: We'll talk about that, Your Honor.

THE COURT: How many are we talking about?

MR. BIRCH: I think about 22 people.

MR. SELLERS: I think it's 21.

THE COURT: So you're not talking about a lot of people. Listen, a lot of work has gone into this settlement. I want you to know that this has been a heck of a job. Therefore, I want to make sure that we do it right. It's wrong to take something -- good work like this and not get it right.

MR. BIRCH: I agree, Your Honor. And I will save my rant and rave on opt our for when it's --

THE COURT: But I think it's a good point. All right. Anything further at this stage now?

MR. SELLERS: No, Your Honor.

MR. BIRCH: No, Your Honor.

THE COURT: Now, let me -- you want to present certain people. Here's what I think we ought to do. Let's break for lunch, but I want a list of the people that want to be heard. And all you people out there that want to be heard, can we get a list for them to sign up, Madam Clerk?

THE DEPUTY CLERK: Yes, Your Honor.

THE COURT: Now, you want to put certain people on the list; is that what you want to do?

MS. HUTCHINSON: Yes, I have a list of people.

THE COURT: You have a list of people you want. You have a list of people you want and --

MS. WATSON: Ms. Hutchinson is going to ask questions of my witnesses as well.

THE COURT: So you're going to do it all?

MS. HUTCHINSON: Yes.

THE COURT: Now, all people here that are here and have an interest in this are going to be heard. So I might have to cut back on your time, but we'll give you a list out there that want to be heard, and the list should say want to be heard, and them I'm just going to say -- I'm going to ask you put in favor, against, and if against, opting out. No, just put favor or against. I'll ask the questions.

Then we'll get the affirmative action plan. You're going to get -- Ms. Watson, you're going to get your information, and is there anybody else that needs anything before we adjourn?

MR. SELLERS: We're going to provide the distribution recognizing that there are some privacy interest of some of the people other than the ones Ms. Watson represents.

THE COURT: I see. Well, we'll put it under a seal order.

MR. SELLERS: That's fine.

THE COURT: Does anybody out there have something to say that must be heard before lunch, won't be

here this afternoon? How many out there are going to be heard this afternoon? That's not a lot; is it.

Well, I think we're going to be able to accommodate everybody without any problem. All right. 2:00 o'clock. We'll recess until 2:00 o'clock. That will give you time to get some of that language in, too, Ms. Hutchinson, if you got that language.

MS. HUTCHINSON: Yes, sir.

(Whereupon, the proceedings were recessed at 12:10 o'clock p.m. for lunch.)

AFTERNOON SESSION

THE COURT: All right. Go ahead.

MR. BIRCH: Your Honor, I'd like to give you the multi-year affirmative action plan, FY 1990-92, the fiscal year 1993 report, the fiscal year 1994 report and the fiscal year 1995 report. As you can imagine the fiscal year 1996 report has not been completed because the fiscal year hasn't been done. It is the intention of the State Department, since these things have a limited five year lifetime to do a new one for 1997.

I note that these have all been approved. I'm sorry. The plan was approved by the EEOC, which is what is set forth in our consent decree and is what is required.

THE COURT: I see.

MR. BIRCH: And we could have his marked as Government's Exhibit 1 for this hearing.

THE COURT: All right. We'll so mark.

(Government's Exhibit No. 1 marked for identification.)

MR. BIRCH: The other thing is I spoke with Ms. Hutchinson about some language to go out in the notice, and we can't agree on the language, so I'll submit something, but the government would agree to provide notice to the 21 individuals who indicated they wanted to opt out, and either by letter or by cable as appropriate depending upon their

location and upon further consideration, two weeks isn't enough time for them to respond. We think a month would be appropriate because we want them to be in a position where they could actually talk about it with a lawyer, because I'm not sure they all understand the consequences.

So our notice, which we'll give you a copy tomorrow, would basically put a return time of 30 days after the Court signed it.

THE COURT: I think you ought to make it after October 1. There are people on vacation. I realize you want to get this thing finished, but I think you ought to make it on -- give them about 60 days so -- the other thing I think ought to be done is somehow there ought to be someone in the State Department in the Legal Advisors Office to be able to answer questions.

MR. BIRCH: I think that would be a conflict of interest, Your Honor.

THE COURT: Well, I think you're right on that, but I'm just wondering -- Ms. Hutchinson, what would you suggest?

MS. HUTCHINSON: I would be willing to answer questions for people who were in this posture.

THE COURT: I got to get a neutral evaluator of some kind. Now, how can we do that?

MR. BIRCH: I think that --

MS. HUTCHINSON: How about one of the members of the review panel since they're already --

THE COURT: That sounds really good.

MR. BIRCH: Or alternatively Judge Kay who has done work on --

THE COURT: Judge Kay would be good. The only thing is I can't have Judge Kay giving advice. That's the only thing. What about a lawyer?

We got Mr. Barry who is an attorney on the review panel. I don't know if he'd want to do it. I'd assume his expenses could be paid by -- I guess we could find a way to

get his expenses paid, but, Mr. Barry, would you come forward and see what you think about that thought. What do you think, Mr. Barry?

MR. BARRY: Good afternoon, Your Honor. Well, Your Honor, as I just said to my co-review panel member, Ms. Bruce, I don't think that I or, frankly, anyone on the review panel is qualified to undertake this task. And the reason is that I'm the only lawyer on the panel. I have never represented anybody in a Title VII class action and last read about opting in a civil procedure in law school, which was some number of years ago.

And while if the Court thinks that that is the best option under the circumstances. I would undertake to do it. I would need a considerable amount of help from plaintiffs counsel and defense counsel to get it to the point where I would feel comfortable advising these folks.

THE COURT: Well, I think we got to make it someone different than -- I think in the notice that would go out, would say that to get information, but not legal advise, we've made available Mr. Barry who can be reached at so-and-so collect. Then I would think that you would explain to that person just the options and what is involved. What the person would have to understand, what would be incumbent upon that person to have to establish. Then I would say that you would then give up -- if they wanted to be in touch with either the class action lawyers, you give up their name, plus you give up the names of Ms. Hutchinson and Ms. Watson, and I think you could almost have a script that would be approved by the parties.

But at least the thing that would impress me about it would be -- well, John raised the problem about one of the people that -- have you made determinations as to only -- you only determined the four people who would --

MR. BARRY: Be reinstated?

THE COURT: Yes.

MR. BARRY: Yes.

THE COURT: But as to those four people, they know what they have to do to get a lawyer and I think you would advise them that anybody would be able to -- then what I would do is mention Watson and Hutchinson and then have the name of three plaintiffs' lawyers in town that are good. Ms. Bernabei -- what's the other name of that fellow that does a lot of these? Chuzi, yes, Chuzi has tried before me. there are about three or four lawyers that do this and then you could give them the panel of a group of people that if you're interested in pursuing this, these are the people you should call.

MR. BARRY: Your Honor, if plaintiff's counsel and defense counsel could agree on a script, that would make me feel much more comfortable doing it. My only other question would be whether my services in that capacity would be covered under the existing immunity order.

THE COURT: Well, we'd have to do it. We'd have to amend it. We'd amend it to do it. But I think it seems to me that they need somebody who is so-called impartial in this thing, and would be able to talk to them. Then I would have a list of three or four -- Chuzi is good, and Bernabei is good and I don't know the third. It's somebody from Chuzi's office, a lady there that's awfully good, too.

MS. HUTCHINSON: Kalijarvi.

THE COURT: Is that the one that had the case before us?

MR. SELLERS: Your Honor, we'd be happy to give Mr. Barry a list of a number of lawyers in town that --

THE COURT: But those I gave you are good. I mean, I've had them, and they are very good. All right. Let's see if we can't get that set up that way. I think it's the only fair thing to do. And it seems to me that we ought to say that if they don't meet that deadline, that that's an important deadline, that that would be it.

MR. BARRY: All right. Your Honor, counsel committing to get together and work on a script?

THE COURT: Well, we haven't yet figured it out. We'll try to figure it out. All right. Anything else?

MR. SELLERS: Yes, Your Honor.

THE COURT: Go ahead.

MR. SELLERS: During the lunch break we gave Ms. Watson a copy, which I'm happy to hand up to the Court if you like, of the distribution --

THE COURT: By letters?

MR. SELLERS: Actually they're just by name. Want to make that Exhibit 2? The first is a list of --

THE COURT: Well no, Exhibit 1 is a government exhibit, isn't it? Make this --

MR. SELLERS: Plaintiffs Exhibit 1 (Plaintiffs' Class Exhibit No. 1 marked for identification.)

MR. SELLERS: The first list is a distribution for those who are intervenors and the plaintiffs. That latter list are names of people who are receiving some recovery and the amounts, but they don't correspond to each other, so it would protect the privacy of the individuals that way.

THE COURT: Okay. Now, how do you want to proceed. Ms. Hutchinson? Do you want to call a witness or do you want to go right down the list here?

MS. HUTCHINSON: Your Honor, I would like to call a witness, but I have a couple of questions about the affirmative action plant that's Exhibit 1. And maybe I can just propose it to Mr. Birch and get an answer to the situation. Somebody could answer it or something like that?

THE COURT: Well, you want to have to do that on the record or can you do it privately? I'd like to get this hearing moving. That's the only problem.

MS. HUTCHINSON: Okay. I'll ask privately, but I don't know. My impression is that this affirmative action plan was done before this consent decree went --

THE COURT: Well, it is because they go back a number of years, don't they, Mr. Birch? This is the normal -- I assume it's their affirmative action plan that they have. It has nothing to do with this case, does it?

MR. BIRCH: Your Honor, we could probably spend half an hour talking about it, but I'll be glad to talk to Ms. Hutchinson at her earliest convenience and try and straighten it out, because I'm sure we've got answers to all her questions, not necessarily time to answer them now.

MS. HUTCHINSON: If, in fact, my questions don't -- I don't feel they're resolved, you know, can I do something written?

THE COURT: Yes. Now, let's see how we want to handle this. We've got two lists here, against and favor, and one neutral, three lists. Now, should I just call these people or do you want to present people? How do you want to handle it?

MS. HUTCHINSON: I think just calling the witnesses.

THE COURT: All right. Just call the people then. Start with the opposed lists. Madame Clerk, go ahead. Just call them.

THE DEPUTY CLERK: Alan Latimer.

THE COURT: Mr. Latimer, would you prefer to sit in the witness chair?

MR. LATIMER: I prefer to sit in the witness chair please.

THE COURT: All right. Well, then we'll swear you and put you in the witness chair. Please to have you here.

ALAN LATIMER, SWORN

THE WITNESS: Can you turn the microphone up? There are some people who can't hear behind the glass.

THE COURT: I don't know if you know there was a stabbing in the courthouse today, so that might show you why that's necessary.

THE WITNESS: I'm glad you have the glass in place.

THE COURT: Go ahead. You want to ask Mr. Latimer questions or would you like to make a statement, Mr. Latimer?

MS. HUTCHINSON: I'll ask him questions and maybe it will go faster.

THE COURT: All right.

DIRECT EXAMINATION

BY MS. HUTCHINSON

Q. Mr. Latimer, can you tell us our name and your address and your current employment and your position and your grade.

A. My name is Alan Latimer, and I am currently residing at 1622 Neely Road in Silver Spring, Maryland. I'm assigned at the moment to the American Embassy in Nairobi, Kenya, as the U.S. permanent representative to the United Nations Environment Program and the United Nations Program for Human Settlement.

Q. And what is your grade and your position?

A. I'm a Foreign Service Officer, Class 1

Q. And how long have you been --

THE COURT: Is Class 1 better than Class 4 or not -- I don't know which way they go. That's the problem.

THE WITNESS: Well, for my purposes, the Senior Foreign Service is better than Class 1. That's the next level above where I am. Class 1 is higher than Class 4.

THE COURT: In other words, the lower the number the better?

MS. HUTCHINSON: Yes.

THE WITNESS: Yes.

THE COURT: Until you get to the Foreign Service; is that it?

MS. HUTCHINSON: Until you get to ambassador.

THE COURT: Ambassador. So you're right below an ambassador?

THE WITNESS: I wish that I was, sir. I'm right below the Senior Foreign Service. In order to become an ambassador, you have to first enter the Senior Foreign Service.

THE COURT: I understand it. Go ahead.

BY MS. HUTCHINSON

Q. Now, how long have you been employed with the Department of State?

A. Nineteen years, 11 months, two weeks.

Q. And in terms of your most recent promotion, can you tell us when it was?

A. My most recent promotion was October, 1993.

Q. And prior to your promotion in October, 1993, what was the date that you last had a promotion?

A. October, 1988.

Q. And in terms of your particular employment as a Foreign Service Officer, what were your performance evaluations like?

A. They have been consistently outstanding and before that superlative, the top ratings.

Q. And have you received any types of awards during the time that you've been employed?

A. I've received two meritorious step increases in lieu of promotions by the selection boards; two meritorious honor awards; one group superior honor award, and an individual superior honor award.

Q. And in terms of your experience in this position with the Department of State, can you tell me have you ever had any kind of advice on promotions or guidance as to how you can get promoted in the Foreign Service?

A. No, because the system is an ad hoc system, and you're expected to be your own career candidate advisor.

Q. And how does it work that you get recommended for promotion? How does the system work actually?

A. Do you want me to describe the selection boards on the promotion system?

Q. Yes.

A. Well, it's a force rating system. That means that the panel members have to assign numerical ratings to individual files, and they read a series of files, and there is a horse trading procedure. People receive from various members of the board a rating from 1 to 10. Then the scores that are given by each of the panel members to the individual files are tallied at the end of the process, and those who have advocates, people on the promotion panels, selection board who know them, they in turn are able to get higher ratings and usually they're able to get promoted.

Q. And have you ever been rated or ranked by any of these promotion panels?

A. Yes, I have been.

Q. Did you know anybody on any of the promotion panels that rated and ranked you?

A. I knew one member who I subsequently approached strictly by accident, because he happened to tell me that he had served on my panel, and I asked him why at that particular time I was not promoted.

Q. And in turn, what did the person tell you?

A. Well, he told me that I had not been assigned to managerial level jobs up to that time.

Q. And in terms of the promotion process as it works, could you personally have reviewed the documents that the rating and ranking panel used or seen their opinions as to whether or not you were promoted?

A. No, there is no formal procedure for the selection board to issue a written statement to any individual who did not get promoted as a result of their decision.

Q. And in terms of this current consent decree that's being proposed for someone in your position, will it make any changes to the promotion process that you know of that would change the system as you've seen it?

A. No, it will not.

Q. Okay. And in terms of the current -- let me withdraw that. Did you file a discrimination complaint with the Department of State during your employment?

A. Yes, I did. I filed a complaint because I was not being promoted at the same rate as similarly situated white Foreign Service Officers.

Q. And when you say similarly situated white Foreign Officers, to whom were you referring?

A. I'm referring to those members of my particular class who started with me in the orientation course in July 26, 1976.

Q. And in terms of this current consent decree, to the best of your knowledge, were you compared for any type of relief with individuals in your particular class?

A. No, I was compared with white male Foreign Service Officers, but not those members in my class.

Q. And in terms of the complaint that you filed, did it deal with more than just promotions? Did your complaint cover more than just promotions?

A. It specifically dealt with promotions, but you can't deal with promotion problems without talking about the impact that a lack of assignment to career enhancing jobs has on your promotion prospects.

Q. Can you tell us in your experience currently how does the assignment process work, and how does it relate to your promotion?

A. Do you want me to describe the entire process?

Q. Yes.

A. When a Foreign Service Officer is due to be reassigned, he's required to submit to Central Personnel six bids in three geographical regions at least. And one those bids are entered into the computer system, this is an automated system. I know about it, because I had some

input in designing it. The bids are confirmed through the automated system, and there is a bid book that is distributed later to the bureaus, the geographic and functional bureaus.

And on the basis of the bid book which contains the names of the bidders and the preference that they have indicated for various vacancies, the bureau principals will then decide based on their knowledge of the individuals, whether they have a good or bad corridor reputation, if they qualify according to their assessment for the vacant jobs.

Q. And in terms of this process, what's been your experience as you bid on particular positions?

A. My experience as a bidder or my experience serving in personnel?

Q. As a bidder --

A. Well, I've found that most of the bids that I've made have usually not been reacted to in a favorable fashion, because many of the positions have already been filled. Unfortunately, though for me, when I looked at the bid vacancy list, they indicated that the bids were still available because the list indicates vacant positions.

Q. And in terms of the bidding process as a bidder, have you ever had discussions with anybody in personnel to talk about your bids?

A. No, I would describe my experience as being an invisible man where personnel is concerned. I've been my own career development officer. I've found out on my own how the system works, and I've had to since receiving tenure, when I've been seeking competitive assignments. I've had to find my own assignments.

Q. Now, you mentioned corridor reputation. What is corridor reputation?

A. Well, that's when various information is passed on whether or not you have a good reputation, meaning that you're a good prospect for the job according to your corridor reputation, whether you have gone along with the system and not made any waves.

Q. Now, in terms of your experience and the current proposed consent decree, does it deal in any way with this assignment process that you have to go through in order to get assignments?

A. No, it does not.

Q. Okay. And during the processing of this civil action, did you as an individual raise concerns about the assignment process?

A. I have consistently rejected in writing and also orally the settlement proposal.

Q. And was one of your concerns about the promotion opportunities and the assignment process?

A. Yes, Those are my primary concerns.

Q. Now, let me ask you. What happens to you today if this consent decree goes into effect in terms of your future prospects with the Department?

A. Well, I won't have any future prospects, because I will be involuntarily retired.

Q. Okay. Tell us why you'll be involuntarily retired?

A. Because I have approximately eight years to be promoted into the Senior Foreign Service. And if past history is any guide, it will be extremely difficult for me to get the type of assignments that I will need to make me competitive for a promotion. It is almost impossible in the State Department to get an assignment to a job that is managerially challenging, such as a deputy chief of mission job or principal officer job.

THE COURT: I don't get it yet. Let me see if I get it. I assume they have and up or out system there, right?

THE WITNESS: That's correct.

THE COURT: Now, when are you up and out point? Have you reached that yet?

THE WITNESS: Well, I have reached the point where it's up or out. I will officially reach that point October of this year.

THE COURT: Is that when you have 20 years in?

THE WITNESS: No, it's 20 years from the time that you were tenured. See, I will be officially considered for a promotion starting this year into the Senior Foreign Service.

THE COURT: And you'll have until October of 1996 to obtain it?

THE WITNESS: No. That is when I will first be eligible for consideration. I was not eligible before because you have to at grade for three years, and my last promotion was October, 1993.

THE COURT: So you have eight years from '96 to get it?

THE WITNESS: I know I will not get it.

THE COURT: Well, how do we know that?

THE WITNESS: Because I've already been tagged with a negative corridor reputation for being involved in this case. So I'm not going to be assigned to the career enhancing jobs that I need to be assigned to in order to get promoted.

THE COURT: Well, wait a second.

BY MS. HUTCHINSON

THE COURT: Well, wait a minute. I'm still confused here. You're saying you believe that because you're involved in this case that somehow that's going to react to your detriment; is that it?

THE WITNESS: This is exactly what I'm saying. There have been individuals who have been involved with activities far less identifiable than this, and they have been labeled as troublemakers, and they have not been given assignments.

THE COURT: But isn't there something in -- there's a retaliation provision in here, right? Isn't there?

MR. BIRCH: yes.

MS. HUTCHINSON: It says they will not retaliate, yes.

THE COURT: Well, I don't know what more we can do, but you got eight years. If they keep doing it --

THE WITNESS: Well, we can change the assignment system and the promotion system. That would stop it.

THE COURT: Well, how do you do that? How do you change that?

THE WITNESS: By having those provisions in the consent decree.

THE COURT: Which would do what?

THE WITNESS: Well, which would force the system to change, to become and open system, a fair system. It's not that way now.

THE COURT: Well, tell me where the system breaks down now?

THE WITNESS: Well, I'll give you an example. If you talk about assignments, I mentioned the bureaus. If the bureaus decide for whatever reason that you are not a viable candidate, then irrespective of your record, and I'm talking about your performance file, which contains your evaluations, you will not get the assignment. And if they're not assigning you to the career enhancing jobs, sir, how would you expect me to be promoted.

THE COURT: You're saying there in an element of subjectivity in the assignment system; is that what you're saying?

THE WITNESS: I am saying that the system is completely subjective. It's arbitrary, and it is not fair.

THE COURT: But I mean. I'm not a -- you got to understand what the power of the Court is. It's a discrimination case. I can't go and tell a company or an agency to redo it whole system to make it fair. I've got -- in other words, there is nothing in the law that says the system can't be subjective, as long as it's not discriminatory. Is it a Mackenzie system? Who is it, Mackenzie that goes out and does this stuff?

MS. HUTCHINSON: Well, that --

THE COURT: Tries to go and evaluate systems, but it seems to me that I think you're asking this Court, not only this judge, but this Court to do something that is beyond our paypack if that makes sense to you. It's not within our jurisdiction to do it.

MS. HUTCHINSON: But, Your Honor, I think that the issue here is, and Mr. Latimer is my client, and I'd like to respond to that, is that this decree does not address this system at all, and not time was spent on it, even though that was the complaint.

The question becomes whether or not this assignment system is subjective based solely on just subjectivity or is it subjective based on race.

THE COURT: But there is nothing in the law that says and organization can't have a subjective system.

MS. HUTCHINSON: But the question is is it subjective based upon race?

THE COURT: These law firms in this city I assume have subjective systems all over the place.

MS. HUTCHINSON: I don't know.

THE COURT: I don't know either. I was in the same position you're in, but the point is that, you know, I don't think we can go and change the world.

MS. HUTCHINSON: But the question becomes is there something that can be done that would assist black and minorities if they felt that they were being improperly denied assignments based upon their race.

THE COURT: I think there is going to be -- you got this Council, and I assume they're going to hear complaints, are they not? It's being set up? No? Aren't they going to hear complaints, Council?

MR. BIRCH: Yes.

MS. HUTCHINSON: I don't know if they hear complaints.

MR. BIRCH: Yes, they are.

THE COURT: Look, you know, I think for this Court to speculate in eight years from now as to what the situation is going to be I think is asking -- you bosses might not even be around in that period of time.

THE WITNESS: Well, Your Honor, the fact that there is not even enough black Foreign Service Officers at the senior levels to constitute a percentage for the purposes of statistical analysis suggests to me that in eight years, I will be in trouble if the system is not fundamentally changed.

THE COURT: I don't know about that. I don't know what's going to happen in eight years. You don't know what's going to happen in eight years.

THE WITNESS: I know what's happened to me, sir, in 19 years, 11 months, and two weeks.

THE COURT: I understand that. I understand that. But, you know, there are a lot of changes that take place. There are a lot of changes that take place in eight years, and I think for us to have to design a system and anticipate what takes place in eight years -- but I'll listen to you. But I'll tell you, I'm not overwhelmed with the business of worrying about eight years. I think we got to watch what happened to you. We got four years to go under this decree and maybe you ought to report back after -- see where we are after a few years.

MS. HUTCHINSON: Your Honor, this gentleman filed a complaint of discrimination. He didn't file a complaint to wait another four years to find out whether or not he has to come back and file again. That's the issue here. If, in fact, the whole import of a consent decree is well, okay, you filed a complaint of discrimination, but wait a little while longer. Let's see if you're truly harmed.

THE COURT: No, I'm not saying that if he can now -- I think what he was talking about is prospective. He wasn't talking about if he had a prior -- if he was discriminated against in the past. He's talking about prospectively now. If, in the past, then, of course he has his options.

THE WITNESS: Can I address that? I think there may be a misunderstanding. I talked about what I thought would happened to me based on my past experiences. I did not discuss my past experiences.

THE COURT: That's right.

THE WITNESS: And the fact that I despite my record, and I described that to you when I first started speaking, I have been consistently behind the promotion pattern of similarly situated white officers who started out with me in July, 1976, and who are still in the system. Let's deal with that.

THE COURT: They're up at the next level?

THE WITNESS: There are many, at least three that I know of, who are already in the Senior Foreign Service. I started out with approximately 30 in my class.

THE COURT: In your class. How many were minority?

THE WITNESS: Sir, I'm the only one. I was the only minority, because the other person dropped out of the class. So, there is only one other minority to compare them with, and that's me.

THE COURT: Now, of the 30, how many are left at the Department?

THE WITNESS: Approximately 26.

THE COURT: The rest stayed in, right?

THE WITNESS: The rest stayed in.

THE COURT: Of those 26, so I assume 25 of them are white?

THE WITNESS: I would assume so, because I'm the only minority.

THE COURT: Now, where are those 25 now? Three of them you say are in the ambassadorial service, the Senior Foreign Service?

THE WITNESS: Three of them are in the Senior Foreign Service as far as I know.

THE COURT: What about, that leaves about 22. Where are they?

THE WITNESS: They are at various levels. Most of them are at the FSO-1 level.

THE COURT: Which is your level?

THE WITNESS: Yes.

THE COURT: So you're saying that 22 of these people are at your level?

THE WITNESS: I'm saying that as far as I know, yes.

THE COURT: Well, I'm not asking --

THE WITNESS: But there is another point that you might be missing. Many of these people have already reached Level 1 before me. And if you look at the average rate of their promotions, it is considerably faster than my rate. And there is a final issue, and that is if they do not op to be promoted into the Senior Foreign Service, then they won't be considered until their total time in service expires.

THE COURT: Well, but also, they might be in a worse position than you in the sense that --

THE WITNESS: There are none who are in a worse position than I am as far as I know.

THE COURT: Well, if they got in earlier than you, don't they have the --doesn't the eight years start running from the time they get in that position?

THE WITNESS: No, I think you might be misunderstanding something. There are several other issues here. One is that in order to be considered for some of these career enhancing jobs that I mentioned to your, you have to reach a certain level. Most of these jobs are at the 1 level.

So if they have been at the 1 level longer than me, they've had more opportunities to be considered for these managerial jobs.

THE COURT: Yes, but I thought you mentioned to me that once you reached that October date, you have eight years?

THE WITNESS: Yes, but you're eliminating one factor. That is you have a total of 20 plus years to be promoted into the Senior Foreign Service once you have been tenured. So it depends on when you were tenured.

THE COURT: And you've been tenured?

THE WITNESS: I was tenured in 1982.

THE COURT: 1982.

THE WITNESS: Yes, sir.

THE COURT: How many years do you have from '82? Twenty years? From"82, 10 years, how many?

THE WITNESS: From '82 I believe it's 22 years.

THE COURT: Twenty-two years. Well, all I'm trying to ask if a very simple question. Are there some who because they got ahead of you on the line, and if they don't make the next point will be out before you have to get out? Is my question clear to you? Some of them have used up some of their time, so to speak?

THE WITNESS: Well, it depends. Some of them have, yes.

THE COURT: In other words, some of them better shape up or they're going to be -- no, the only thing I was mentioning, too, eights years things can happen. For example, suppose that you find that the complexion of that group over there has changed by then. And that's not unrealistic.

THE WITNESS: But if you were in my position and you had my experiences, why would you assume that in eight years things would change? Or would you be willing to jeopardize your career to wait, hoping that they would change.

THE COURT: No, but the only point is there's a lot of things that are dynamically -- that are changing. But I think your counsel made a good point, namely, the past. I was just looking at the future. Obviously if you have an actionable case based upon past discrimination. I thought we were just talking about now about the prospective relief which was to change the whole system to prevent something like this from happening.

But if you have, and I assume you do have -- I assume you do have allegations of past discrimination that has prevented you from getting to the 1 position sooner; is that what you're saying?

THE WITNESS: Yes, I filed an EEO complaint because of my slow promotion rate, and --

THE COURT: Where is that complaint now?

THE WITNESS: I have not heard anything on the complaint for the last 13 years.

MS. HUTCHINSON: They're all pending. My understanding is they agreed, I don't know, but there's some kind of pending agreement, so they left them all pending.

THE COURT: So in other words, because of this lawsuit, they're all pending?

MS. HUTCHINSON: Yes.

THE WITNESS: Yes, sir, I would assume that's the case.

THE COURT: I see.

MS. HUTCHINSON: Because they said they wanted to process this and not do the same thing --

THE COURT: And then that gets wiped out if this case goes --

MS. HUTCHINSON: His complaint would be gone.

THE COURT: But I assume if you don't op in, then you -- this will not touch his complaint I assume if he opts out? Even under you theory, Mr. Birch.

MR. BIRCH: If you allow him to opt out, then he would proceed with his individual claim.

THE COURT: And I assume that is what you want to do?

THE WITNESS: That is exactly what I plan to do.

THE COURT: Anything further?

THE WITNESS: No, sir. I would just like to point out that the plaintiff interveners have consistently rejected this proposal. It is not fair. It does not deal with the systemic discriminatory practices in the areas of promotion assignments and selection out. And if the Court doesn't craft or have some input on devising a system that is fairer, then I really don't understand what we're doing here, sir.

THE COURT: Well, again, --

THE WITNESS: With all due respect.

THE COURT: Well, I think you've got to understand what my role is. My role as I see it, and I could be wrong, I go as far as I believe I can in my role, but I believe that I can't go and tell the State Department to adopt another system because it would be a fairer system. I can only -- unless it's a discriminatory system, the system the have. and i don't know if anybody has ever held that a subjective system is per se discriminatory, and I think that's what I'd have to find to change it.

Do you gentleman agree with me or don't agree with me?

MR. BIRCH: I think in essence, you're right, Your Honor. There are all sorts of laws that allow subjectivity determinations. The ultimate questions is what is the impact?

THE COURT: Well, let me hear from plaintiffs' counsel. How do you feel about that?

MR. SELLERS: Your Honor, we've been confronted with this difficulty since we began this case that there is no question that the system has a lot of subjectivity in it. But as we understand the prevailing law, absent evidence that is operated in a discriminatory fashion, there is no authority that we have to be able to impose changes.

And I might add that the prospective relief provisions of the decree provide that -- permit us to detect disparities in the future and to bring them to the attention of the Court. So if these problems, if they are systemic in nature, persist on a racial basis, we'll be right back here to ask the Court to take them up.

THE COURT: What you're saying is the discrimination is very subtle or maybe not so subtle.

THE WITNESS: I'm saying that it's both. In many respects, it's very subtle, and it's extremely difficult --

THE COURT: They never come out and tell you that it's because of race that this is what's happened to you?

THE WITNESS: No. And I would describe it as having an abscessed tooth. You know the tooth is aching. You know the abscess is there, but sometimes it's very hard to identify what the infection is so you can address it.

THE COURT: All right. Thanks. You've been helpful. Any cross-examination?

MR. BIRCH: No question, Your Honor.

THE COURT: Thanks very much. Call the next person. Oh, you have a question? Identify yourself for the record again.

MS. BUCHANAN: Avis Buchanan on behalf of the plaintiff class and with the Washington Lawyer's Committee.

CROSS EXAMINATION

BY MS. BUCHANAN

Q. Good afternoon. Mr. Latimer, I just have a question about your career at the State Department. You served as DCM is that right?

A. Yes, I did.

Q. And could you describe for the Court what that is?

A. Before I describe what it is, sir, if I can just give you some background. That particular assignment, although the system is claiming that they have had some influence over my getting the job, that particular assignment, I got that assignment myself. The ambassador in question who selected me at his DCM found out about me because he was serving at a nearby post. I was serving in West Africa.

He then contacted me directly on the telephone. I went up to his post in Conakry, Guinea. At the time I was in Freetown, Sierra Leone. He interviewed me. I spent the weekend with his family, and he selected me as his DCM. Central Personnel had absolutely nothing to do with it. They didn't broker the job. They simply went through the formality of assigning me because an ambassador can select whomever he chooses to serve as his DCM.

THE COURT: See, you've now described where subjectivity is to your benefit. That's clearly a subjective -- under your system, that couldn't happen.

THE WITNESS: But how many examples do you have of Alan B.C. Latimers getting DMSships based on subjectivity? That's exactly my argument. I'm the exception to the rule. So if black Foreign Service Officers were being assigned to those kinds of career enhancing jobs, then we wouldn't have any need to be here in the Court today.

THE COURT: But I'm saying I think the point counsel is making is the subjectivity worked to your favor.

THE WITNESS: Yes, sir, but in most cases, it doesn't.

THE COURT: I understand that.

THE WITNESS: That's the problem.

THE COURT: But I think that's why counsel here have indicated why the subjectivity alone isn't enough.

THE WITNESS: Well, but if the subjectivity is discriminatory, correct me if I'm wrong, sir, doesn't that fall within the purview of this Court?

THE COURT: No question about it. And I think that is what is agreed upon. Anything further?

MS. BUCHANAN: No. Thank you.

THE COURT: Thank you very much. That was helpful.

All right. What is DCM now again? Just remind of that.

THE WITNESS: It's Deputy Chief of Mission, the number two person in an embassy. It's the ambassador's deputy.

(Witness excused.)

THE COURT: All right. Get the next one.

THE DEPUTY CLERK: Bruce E. Thomas.

BRUCE E. THOMAS, SWORN

THE COURT: Who is going to handle this? Is that your witness. Ms. Hutchinson?

MS. HUTCHINSON: If he want to just speak independently --

THE WITNESS: I would prefer to have you ask questions.

MS. HUTCHINSON: All right.

DIRECT EXAMINATION

BY MS. HUTCHINSON

Q. Can you state your name for the record and your position, where you're employed and your grade for us please.

A. My name is Bruce E. Thomas. I am employed by the Department of State. I'm an FSO-1, and I'm currently assigned to the U.S. Embassy in Ankara, Turkey as political military counselor.

Q. And Mr. Thomas, how long have you been employed with the Department of State?

A. Since June or July 1979.

Q. And during that time have you had any experience with the system in terms of promotions and in your positions?

A. Certainly, yes.

Q. And can you tell us or tell the Court what your experience has been in term of promotion for you as an individual Foreign Service Officer?

A. Well, you learn early on in the service that in order to be promoted, you have to be assigned to jobs that areas we refer to them career enhancing. If you, like I am, are a political officer, you have to be assigned to an embassy where there is something happening, something encompassing the vital interests of the United States.

For instance, like Bosnia. If you are assigned to our embassy in Sarajevo, one could reasonably expect to be promoted as a consequence of that assignment. Or if you served in El Salvador or the Philippines during the Philippine revolution. Wherever there is something of a vital nature happening, you have a reasonable expectation of being promoted.

Q. And have you had an opportunity in your position to participate in the assignment process that gets individuals assigned to positions?

A. In what way?

Q. In terms of your particular assignments that you receive for your job, have you participated in the assignment system that the Department has?

A. Well, it's referred to as the open assignment system, but there is nothing open about it. As Alan described, the way most Foreign Service Officers are assigned to positions is they go to the bureaus, because they know someone in the bureau or there is someone who is connected to that bureau through previous service who can speak on that officer's behalf and the assignments are usually brokered in that way.

In other words, the bureaus generally have a preferred candidate for the high profile jobs that will get you promoted.

Q. When was -- when did you get promoted to the FS-1 level?

A. In October, 1993.

Q. And prior to --

THE COURT: That was a good year. Everybody --

THE WITNESS: Yes, it's very curious, Your Honor.

BY MS. HUTCHINSON

Q. Now, prior to that time when was your last promotion? Do you recall?

A. I believe it was in 1989.

Q. And in terms of your particular experience, did you have any feelings or do you have an opinion as to whether or not being a black Foreign Service Officer had any effect on your employment.

A. Certainly. Because I developed a corridor reputation during my first assignment in the Foreign Service because I raised some issues having to do with racial discrimination, not against me, but against someone else in the mission.

Q. And who was the individual that you raised information about?

A. I won't use a name, but it was a person employed by the United States Information Service, which is the arm of USIA overseas.

THE COURT: This was a person you were befriending?

THE WITNESS: This was a friend of mine, yes.

BY MS. HUTCHINSON

Q. And can you tell me in terms of this corridor reputation, what effect did that have?

A. Well, in my next assignments, my first meeting with the ambassador, he said to me, I heard about all of that civil rights nonsense that you were involved in in Caracas,

and I'd like to let you know that there won't be any of that here. And I asked him, what, Mr. Ambassador, civil rights? And he said, that's just what I'm talking about. I don't need that from you.

THE COURT: Was he a career ambassador?

THE WITNESS: No, he was a political appointee.

BY MS. HUTCHINSON:

Q. Now, in terms of you say corridor reputation, is that a formal practice in the Department or --

A. No, there is nothing formal about it. When the people who make decisions about who is to be assigned where, because of their positions in the geographic bureaus or in functional bureaus sit down to discuss informally assignments, they have lists that they compare, either lists in their heads or they have little notes that they've scribbled of the people who they prefer to put into those positions. Everyone knows that that is how the system works.

Q. Is this corridor reputation, is it a term that people in the Department use on a regular basis?

A. Certainly. In fact. I am certain that they have used that term on the sixth floor in the Director General's Office. They've talked about people's corridor reputations.

THE COURT: Let me ask you. On this anecdote that you mentioned about the ambassador. Had you been appointed to the job?

THE WITNESS: Yes, sir, I had been assigned.

THE COURT: And you were the DCM; is that --

THE WITNESS: No, no. It was only my second tour in the Foreign Service, and I was in a consular job, although tome as a political officer, so I was assigned to a consular position. And for a political officer or any other officer in his or her cone, if you are not competing against your contemporaries, then you are behind the curve.

THE COURT: Let me ask you this. Could you just help me a little bit. I've been so far away from this. What's the difference between a consular officer and a political officer?

THE WITNESS: A consular officer is someone who performs consular functions, such as issuing visas or someone who may work in the area of American citizens services overseas, like registration of births, issuing passports, authentications and things of that nature.

A political officer is someone who attempts to collect political intelligence for the use of the United States Government.

THE COURT: And it's better to be a political officer than a consular officer?

THE WITNESS: Some seem to think so, yes.

THE COURT: In other words, do you get more leeway, more discretion?

THE WITNESS: Difficult to say. Most ambassadors come from the political or economic cones, very few from the consular and administrative cones.

THE COURT: And there is a so-called economic officer, too?

THE WITNESS: They wouldn't call themselves so called. There are economic officers, yes.

THE COURT: What do they call those fellows? What are they called?

THE WITNESS: They call themselves economic officers, sir.

THE COURT: They do?

THE WITNESS: Yes.

THE COURT: They're not supplied by the Treasury Department, are they?

THE WITNESS: No. An Econ officer is an FSO and performs in the Econ cone. There are officers assigned to missions who perform commercial duties, and they are supplied to our missions abroad by the Department of Commerce.

THE COURT: I remember in one overseas trip I met a Treasury official at our embassy in Britain. Would that be normal or not normal?

THE WITNESS: It depends on the size of the mission, Your Honor. Some of our larger embassies will have representatives of virtually every agency and department of the U.S. Government at that mission. So you could find --

THE COURT: A Treasury --

THE WITNESS: -- Treasury officials. There would be people from the Internal Revenue Service, FBI agents, Customs officials, people from the Department of Agriculture. It usually depends on the size of the mission.

THE COURT: I see. I'm sorry. Go ahead.

BY MS. HUTCHINSON

Q. Now, what effect would the provisions concerning promotions have on you as an employee who is at an FS-1 level in this consent decree?

A. I don't know that they would have any effect on me.

Q. Are you -- also, your next promotion, would it be into the Senior Foreign Service level?

A. Yes.

Q. Okay. And if you don't get promoted to the Senior Foreign Service within your 20 year time span are you also -- will you have to leave the service?

A. Well, I haven't applied for the Senior Foreign Service, simply because I know that in the last two years I have not been assigned to jobs that have made me promotable. In fact, I wasn't eligible. But even with that, when the panel looks at you for promotion into the Senior Foreign Service, they will go back to the point where you became eligible, even though you were not considered until you apply.

Q. So, when did you first become eligible?

A. Well, when I was promoted to FO-1, I knew that my first year of eligibility would be this year that I could apply for the Senior Foreign Service, but I chose not to do that.

Q. And if you don't get promoted in a certain time period into the Senior Foreign Service, will you have to leave the Foreign Service.

A. That's correct.

THE COURT: That's eight years?

THE WITNESS: I'm not certain. I believe the tick is between 20 and 22 years. I'm not absolutely certain of that point.

THE COURT: And you've been how many years in service?

THE WITNESS: I've been in the service for 17 years.

THE COURT: Seventeen, so it would be five years then?

THE WITNESS: I believe so.

THE COURT: And since --

THE WITNESS: We'll it's from the time of tenuring, sir.

THE COURT: Pardon me?

THE WITNESS: It's from the time of your tenuring.

THE COURT: When was that? When were you tenured?

THE WITNESS: I was tenured in 1984.

THE COURT: So you would have until 2004. So that's about eight years.

MS. HUTCHINSON: Yes, 2004.

THE COURT: Let me -- well, since '93 what were your assignments, since you became an FS --

THE WITNESS: 1993 and 1994 I worked in the office of the Undersecretary for Political Affairs, Peter Turnoff as his special assistant for Latin America, the Caribbean and Africa.

THE COURT: That would seem to be a heck of a high position. Does it just sound that way or is it?

THE WITNESS: No, it was a very good job, sir.

THE COURT: Why wouldn't that put you in the position to get the next spot?

THE WITNESS: Well --

THE COURT: Is it because of time? You haven't had that much time?

THE WITNESS: No, it depends on what your principal wants to do on your behalf. If he or she wa to make phone calls to tell people that they would like you considered for a certain position, it's usually automatic that the person receiving a phone call from the Undersecretary of State for Political Affairs would get the message that he wants that person to get the job. If the Undersecretary chose to do so.

THE COURT: Well, all right. But that obviously is something that the Undersecretary -- it's up to him to do it or her to do it.

THE WITNESS: That's right. Some choose not to do that.

THE COURT: And that we can't say is discriminatory.

THE WITNESS: No.

THE COURT: Now, what is the job that you had since you had this other job?

THE WITNESS: I spent a year at the National Defense University of For McNair at the Industrial College of the Armed Forces.

THE COURT: That doesn't hurt you. I thought that's a plum job, isn't it?

THE WITNESS: Depends on what happens after that.

THE COURT: No, but my understanding, the little I know is that that is usually a plum job when they send you to school for a year.

THE WITNESS: Right, I thought--

THE COURT: They don't send people on the downside to get education.

THE WITNESS: No, I thought that when it was worked out with Personnel I was going to the War College instead of ICAF.

THE COURT: The War College is better?

THE WITNESS: In terms of the service, yes.

MS. HUTCHINSON: Yes.

THE COURT: All right. So you had those two assignments, and you say -- when would you be first eligible to go to the next -- after you get your FSO-1, do you have to spend so many years in grade as an FSO?

THE WITNESS: Well, I was assigned to Ankara. Well, it's been about six weeks since I learned of the assignment. It is a very good job. But again, it was not a situation where Central Personnel had anything to do with my assignment. I know the ambassador personally, and I phoned him and we talked about it, and be worked it out.

THE COURT: Well, you see, you and Mr. Latimer are telling me telling me that you want to do away with that system

THE WITNESS: No, I didn't tell you that, sir.

THE COURT: Well, Mr. Latimer did.

THE WITNESS: No, I didn't say that.

THE COURT: Well, but that's a subjective system, and there are individual cases involving black officers where they have benefited by that informal system.

THE COURT: Well, you see, exactly my discussion with Mr. Latimer when I said don't know what's going to happen in the next few years in the society we're living in. You don't know who is going to be the next Secretary of State, who's going to have all the top jobs, who obviously could switch the system around.

But let me ask you this. Have you filed a complaint like Mr. Latimer did?

THE WITNESS: I fought a recommendation that I be selected out of the Foreign Service back in 1984-1985 on the basis that as it was explained tome by the chief of Personnel and the then head of the Junior Officer Division, I was not Foreign Service material. That's what I was told.

THE COURT: Well, all right. You won that. Let me ask you this. Where do you stand on this settlement?

THE WITNESS: I oppose it because it's not fair.

THE COURT: You oppose it. Now, is the opposition based both on the retroactive effect and the prospective effect on one or the other?

THE WITNESS: No, my reasons are personal. Your Honor, and they have to do with my friendship with Walter Thomas and having served with him at the post where his problems began. This is the mission to the Eastern Caribbean, Barbados and Antigua, and I saw what happened to him, and I know what happened to me as a consequence of my support for him and Eric James and others who were at that mission. You had nine black officers in that mission, sir. Six of them were recommended for selection out of the Foreign Service.

Since that time, Your Honor, I have received three individual meritorious honor awards, one individual superior honor award, meritorious step increase and a quality step increase, not because I was not Foreign Service material. Obviously because people recognized my abilities.

THE COURT: Well, you see, the system sometimes works.

THE WITNESS: If there are people in the system who will attempt to make the system work.

THE COURT: I mean, yes. So where do you stand? You're going to opt out?

THE WITNESS: Yes.

THE COURT: Okay. But you have no pending discrimination claim at this time?

THE WITNESS: No, sir. And even though you opt out doesn't mean that you're going to file a separate discrimination lawsuit, is that right?

THE WITNESS: No, Your Honor. I'd just like to make a brief statement if I could.

THE COURT: By the way, before you do that, are you -- will you be getting anything under this settlement at all?

THE WITNESS: I don't believe so.

THE COURT: So you get zero. So it doesn't pay to stay in.

THE WITNESS: I have never been notified by the attorneys that I was eligible for anything. I did not receive any correspondence from Akin Group saying that Bruce E. Thomas would receive X dollars as a consequence of the consent decree.

THE COURT: So you might be in the over-achieved class I guess that was described today?

THE WITNESS: Yes, sir.

THE COURT: In other words, that you have not been treated --

THE WITNESS: After 1984, sir, when I was recommended for selection out of the Foreign Service, I made it my crusade, a personal crusade to try to dispel the erroneous assessment that people had about me.

THE COURT: Well, you've done a good job. Well, let me ask you. does he get anything out of this?

MR. CONNELLY: Your Honor, we tried as hard as we could to try and get a letter to every single person who had getting damages. Mr. Thomas is on our list. He is going to get damages for the promotion delay he suffered from Grade 4 to Grade 3.

THE COURT: Does he -- do you know the amount of money or can he be told that?

MR. CONNELLY: I can tell him that privately, Your Honor.

THE COURT: Well, he has to know before he determines whether he's going to opt out.

THE WITNESS: No, no, no, I don't have to know that. Because it's not important to me -- I don't have the money now, sir, so it's not important to me. The issue here is fairness, and I don't see how anyone could consider this far when the person who has been the lead plaintiff in case, Walter Thomas, walks away with I believe $40,000 after nearly 11 years?

THE COURT: I thought he gets more than that.

THE WITNESS: Even if it's $71,000, sir, as an FS-1 where Mr. Thomas probably would be if not Senior Foreign Service, he would be making perhaps over $80,000 a year. If you compute the amount of money that Walter Thomas would have earned had his career not have been shortened by the discriminatory practices of the Foreign Service, it's a whole heck of a lot more than $70,000.

You made the point, sir, that it was fair, that is was reasonable for the attorneys of Akin Group to receive $18 million for the nearly 11 years that they have spent on the case. Why is it not reasonable that Walter Thomas would receive more than $70,000 for the 11 years that he has fought this?

THE COURT: Well, we will consider that. But the point that I'm making to you is you got several decisions to make. One is the opting out. Two is to bring your own lawsuit, and what I was suggesting to you since you haven't been told, I think for you own benefit you should -- in other words, you can still oppose it without having to opt out, and still be able to obtain any sum that you're entitled to.

I only mention that, because, you know, I understand how you feel and the solidarity aspect f it is important, but you should still make your own decision based upon all the information. And you don't have all the information. That's all I'm trying to tell you.

THE WITNESS: I appreciate that.

THE COURT: No, all I'm mentioning to you is that you don't have the opt out to be able to get that message across. You could still oppose the settlement.

THE WITNESS: And I do oppose it.

THE COURT: Do you understand the distinction I'm saying?

THE WITNESS: But we're not at that point yet, are we, sir?

THE COURT: I think we are. I don't think you have to do it at this moment, but I think that's something you got to consider. In other words, opting out really is for those people who are going to take that next step, because otherwise if they're not, then the only people that -- I don't know what happens to the money and the -- we don't know what happens to the excess money.

THE WITNESS: Well, if I can make a suggestion, if I opt out, the money that was due me, give it to Walt Thomas on my behalf.

THE COURT: Well, that may well be possible. That may well be possible. That may well be possible.

THE WITNESS: I'll sign anything that would be necessary. Any kind of legal instrument to give him the money.

THE COURT: Well, that may well be possible. That's a good point. Otherwise, if you don't do something like that it may well go back to the State or the government.

THE WITNESS: We wouldn't want that.

MS. HUTCHINSON: They have a remainder clause in this. There is some sort of remainder clause in the consent decree.

THE COURT: There is a remainder clause.

MR. BIRCH: She's wrong. If he wants to give his money to Mr. Thomas, and assuming Mr. Thomas doesn't op out or for that matter if he wants to give his money to M.r. Thomas we don't care. That's between him and Mr. Thomas.

THE COURT: All right. Let's get to the next witness. You've been very helpful. Good luck in your next assignment.

Who is the next --

(Witness excused.)

THE DEPUTY CLERK: Is it Odie N. Fields?

ODIE N. FIELDS, SWORN

THE COURT: Ms. Hutchinson, you're up.

THE WITNESS: If you don't want to ask -- I don't want to make a statement.

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. If you would state your name and address and would you tell us what you think about this consent decree.

A. My name is Odie --

THE COURT: How do you spell that?

THE WITNESS: O-D-I-E, Nelson, N-E-L-S-O-N, Fields, F-I-E-L-D-S. My address is 2500 Dickerson, D-I-C-K-E-R-S-O-N, Road, Apartment 102, in Reno, R-E-N-O, Nevada, N-E-V-A-D-A.

THE COURT: I'll ask the questions. Where do you stand on the settlement?

THE WITNESS: I oppose the settlement, Your Honor, as I have stated in writing to the Court, and I again want to personally indicate that I oppose the settlement because I think that it's not only unfair, but is a mockery of justice and I think in some ways very oppressive.

THE COURT: When did you start working for the State Department?

THE WITNESS: I began working for the State Department in August of 1978.

THE COURT: And when did you leave the State Department?

THE WITNESS: I left the State Department in April 29, I believe, of 1988.

THE COURT: Now under this consent decree are you to receive any money?

THE WITNESS: I am to receive a total amount I believe about $77,000 a total amount. Break that down, it's about I think for about 65 cents an hour and compares to --

THE COURT: Thirty dollars and hour, huh?

THE WITNESS: --$30 an hour for the attorneys, and I think that's a big difference.

THE COURT: What do you do now for a living? Are you retired?

THE WITNESS: I am unemployed and have been since 1991.

THE COURT: What did you do between '88 and '91?

THE WITNESS: Between 1988, April of 1988 until October of 1989, I was unemployed. Which in October of 1989, I obtained a position with the State of Nevada, the same government agency that I had worked for when I began working for the State Department.

After which during that period of time, I can to Washington on a trip, went by the State Department to visit colleagues and so forth and so on, and I did indicate where I was working. About six weeks later I end up losing that job. I was later told the phone call came from Washington and that was the cause of me losing that job.

I have indicated that in documentation in writing to the Court, as well as to the State Department, an agency of -- the Equal Employment Opportunity Commission in order to have that incident investigated as well as other subsequent information in which I have received that the State Department may be interfering in my obtaining work.

THE COURT: When you left the State Department, was if for cause?

THE WITNESS: I left the State Department because as they told me, I did not and was not recommended for tenure and I had prior to that time I had been extended. I think I received extensions to grievances for say about three years from 1986, 1987 and also I received an extension in 1984, based upon a grievance and also an EEO complaint which is still writing the State Department.

THE COURT: Now, you oppose this settlement, I take it?

THE WITNESS: Yes, I do, wholeheartedly.

THE COURT: And are you going to be someone that's going to opt out on this?

THE WITNESS: Yes, I believe I have no alternative but to opt out.

THE COURT: And that you will, therefore, bring you own case.

THE WITNESS: Yes. I would like to comment, Your Honor. --

THE WITNESS: Surely

THE WITNESS: -- in regards to my not receiving tenure. As I have submitted to the court and I would like to state at this time is that although I informed that I was not recommended for tenure, that my file, my personnel file was not reviewed for three consecutive years, 1985, 1985, and 1987,

And that someone made a decision somewhere to try to cover up what had been done. Someone forged the initials on the sheets, because each individual board member is suppose to sign a check-out sheet. Now, in one affidavit from the chairwoman of that board, indicating in her affidavit that in a very clever way in which she is supposed to be signing for as chairwoman, she indicated that one set of initials were not hers. Then, if they were not, then whose were they? Because she was still the chairperson.

Now, and once you could look at the sheet, you will see that all of the initials were in terms of the loops and it's very easy for any layman to see. You don't have to have a specialists, that they were signed by the same person. Now, unfortunately, in the system that we have, that they have at the State Department, is that the commissioning and attaining board works like this? They do not sit together as a board, as a unit. People are supposed to go and check out files. They don't work as a group, and they can do whatever they choose to.

And sometimes I would suspect, because they really don't get any additional pay for this function, that what they do if they're in a rush, they have a task to achieve, that in a hurry they just make some marks, either yeah or nay or whatever. Depends on what they think.

And in my situation, I ended up on the short end. Now, I'm still baffled. I think I know why, but how can a person's file not be reviewed for -- you know, I can possibly conceive it happened, although it shouldn't, for one year, but two and three years?

THE COURT: Has your matter been looked at by the Inspector General's Office to get involved.

THE WITNESS: No, I wrote the State Department and asked for the Inspector General's Office to get involved. The office of EEOCR, the Equal Employment Opportunity Commission Office of State Department indicated that they were handing the grievance and, of course, they really didn't want to get involved.

However, you know, whether they inspect it or whether someone else inspects it, I'm the only one who lost my job. And it really should not have happed.

THE COURT: I see. All right.

BY MS. HUTCHINS:

Q. Were you confronted for reinstatement under this decree?

A. No, and that's another thing that sticks in my craw. And that is that I am not on the reinstatement list. And I tried to find that out for a number of times, and I have requested this information from counsel. They will not tell me, and when I say will not tell me, they have absolutely refused to tell me.

Now, as I wrote to the Court, in one instance is that Counsel Anderson laughed and said, ha, ha, ha, I know, but I can't tell you. And I still have not been told why. Now, I do know that one time that I was supposed to be on the reinstatement list, and somehow some magical reason that my name was dropped.

THE COURT: What was you last position?

THE WITNESS: I can in as an FSO-3, and I left out as -- I left as an FSO-3. I did not receive any promotions.

THE COURT: In 10 years?

THE WITNESS: In 10 years. Now during that period of time, I might add, is that, you know, it wasn't because, you know. I was not a good performer in my job, because the last ratings that I received I think about superlatives and outstanding.

Now, during that period of time, which is also baffling to me, is that the promotion boards, one promotion board gave me a meritorious step increase prior to the commissioning and attaining board meeting based on performance. And then the commissioning and attaining board turned around and did not recommend me for tenure.

THE COURT: So your point is you're going to opt out on this, right?

THE WITNESS: Yes.

THE COURT: Okay. Thank you. Next? Let's go.

(Witness excused.)

THE DEPUTY CLERK: Ray Robinson

THE COURT: Ray Robinson in the courtroom?

MS. HUTCHINSON: Your Honor, these are people who have previously testified, so I thought if we just ran through what their concerns were about the decree real quick --

THE COURT: You're terrific.

RAY ROBINSON, SWORN
DIRECT EXAMINATION

BY MS. HUTCHINSON

Q. Would you state your name for the record please?

A. Yes, my name is Ray Robinson.

Q. And Mr. Robinson, in terms of this current consent decree, what -- how will it affect your status as a Foreign Service Officer currently today? What effect will it have?

A. Well, it will insure that I will be separated from the Foreign Service in little over two months.

Q. And why is that?

A. Because the consent decree is extremely flawed, and it does not allow me as one of the original plaintiffs and one of the plaintiff interveners to compete for the 17 promotions that were offered in the consent decree.

Q. And what would be your next level of promotion if you receive a promotion?

A. I would go from OC to MC, which is within the Senior Foreign Service.

Q. And the consent decree will prevent you from having any eligibility for the promotions that are outlined in the decree?

A. That is correct.

Q. And you last date of employment will be when?

A. I will be separated on the 27th of September.

THE COURT: After how many years?

THE WITNESS: Twenty years, sir.

THE COURT: Would you be eligible for anything, a --

THE WITNESS: They offered me something like $31,000, Your Honor.

THE COURT: As a buy-out?

THE WITNESS: Oh, no, no. This is in the consent decree.

THE COURT: I mean, will you be able to retire?

THE WITNESS: Oh, yes, I'm retirement eligible.

THE COURT: You are retirement eligible?

THE WITNESS: Yes.

THE COURT: And so the reason that you'll not get another assignment is because you haven't been selected for a Foreign Service position; is that it/

THE WITNESS: I wasn't promoted within the seven year time frame, but this I contend was because of the discrimination against me, and I have three unsettled EEO complaints, plus a grievance to this offense.

THE COURT: Now, you position on this decree is you will opt out?

THE WITNESS: Absolutely.

THE COURT: And bring a lawsuit?

THE WITNESS: Absolutely. Well, I don't have to bring. I would want to continue with those I have ongoing I filed one in 1986, one in 1987, --

THE COURT: These are lawsuits?

THE WITNESS: These are EEOC complaints.

THE COURT: Which have not been resolved?

THE WITNESS: Which have not been resolved. And then I filed another one in 1994.

THE COURT: If they resolve against you, there will be a lawsuit I assume?

THE WITNESS: I didn't understand?

THE COURT: If you get a decision against you, you'll go to the next step?

THE WITNESS: If this consent decree is approved, which I really hope it is not, then I will be forced to -- you know, I've indicated on several occasions I will opt out. Then I have to come as I understand it back before you.

THE COURT: But I think if there is an administrative -- you have to exhaust your administrative remedies, I would assume. Isn't that your position, Mr. Birch?

MR. BIRCH: I think, Judge, he has two Title VII administrative complaints and one grievance pending. At least the Title VII complaints have been pending for more than 180 days, so he would have the option, he would either go through the administrative process --

MS. HUTCHINSON: Well, Your Honor, --

MR. BIRCH: If I may finish, please, Ms. Hutchinson

THE COURT: Go ahead. So in other words, you have to get a lawyer. That's why you got to do.

THE WITNESS: Well, Mr. Birch is in error. I have three complaints.

MR. BIRCH: I was going to say before Ms. Hutchinson interrupted me, the third is a grievance.

THE COURT: But the point is you're going to have to -- look, we can't give you legal advice. You're going to have to get you own lawyer.

THE WITNESS: Well, I have a lawyer right now.

MS. HUTCHINSON: Your Honor, the problem about having these individuals such as Mr. Robinson who is also a plaintiff in this action start all over again is his complaints were held up not because he requested it, but because that was part of the agreement in this lawsuit. So to just say he goes out and has to start all over again --

THE COURT: Well, that's assuming -- okay. I understand that.

MS. HUTCHINSON: You make a deal and hold up somebody's cases because you want to do something else, and then tell them, well, no, you start back at the beginning. I don't know that --

THE COURT: Well, wait. Let's be fair. The government I assume they only got in the settlement because both sides wanted to settle it. Thank you very much.

THE WITNESS: Oh, no, I have a prepared statement. I have much --

THE COURT: Well, how long is the statement?

THE WITNESS: Well, it will take about five minutes to read, but, you know, my life is --

THE COURT: All right. Let's go.

THE WITNESS: Because I had several other things to talk about with respect to how it impacts me. It impacts me and will put me in the street within two and half months. For me personally, it did not allow me to compete for the 17 promotions because this caveat that was included in there in the consent decree stated that you had to have been recommended for promotion.

Given the discrimination I've been subjected to, you know, my file is not strong enough to do that. And I've indicated in my written statement why this is overall a bad consent decree for both plaintiffs and putative class members, and I can run through that very quickly.

THE COURT: Go ahead.

THE WITNESS: The first is the prospective relief is totally inadequate to prevent the Department from continuing its racially discriminatory practices against black officers. The decree attempts to prevent plaintiff interveners from pursuing the appropriate relief for which they are entitled to under the law.

The decree actually punishes and penalizes plaintiffs and individuals who have been damaged by discrimination because it eliminates these individuals from eligibility for retroactive promotions. This is accomplished by requiring

that they be recommended for promotion. Because of discrimination and retaliation in the preparation of their evaluation reports, the personal files of this group of black officers were not sufficiently strong for them to be recommended for promotion.

Only 17 retroactive promotions are offered when the plaintiffs' statistician calculated a promotion shortfall of 37. And let me interject a point here. Mr. Birch talked at length about their -- his statistician. Now, Akin Gump has paid several hundred of thousands of dollars to an excellent statistician in Miami, and she's not here. And those statistics show, you know, they're 180 degrees in opposition to those of Mr. Birch. Why is Akin and Gump or why did they not bring this statistician here? That would have given you a completely different point of view.

Her calculations indicated there was a shortfall of 37 promotions. It showed the necessity for cascading into the Senior Foreign Service. These are things that were provided for in the Palmer suit, and they're not in this suit.

The decree does not provide for retirees having their annuities adjusted for loss or delay or promotions which was provided for in Palmer. This decree does not provide for the reinstatement of tenured black officers. They just told Mr. Thomas, I'm not going to reinstate you, and there's nothing you can do about it. And there was not provision for pay in lieu of reinstatement, none. They just said, we did it. It was probably wrong, but you're not going to get anything.

The decree only allows for four black officers to be reinstated because of legally being refused tenure, and you went into fairly in depth. The retroactive monetary settlement amounts are not based on necessary calculations and may well not be adequate. The individual claims of plaintiffs and putative class members were not calculated to arrive at the settlement figure.

And if you'll just give me one or two more second, I'd just like to talk about our representation by Akin and Gump and the Lawyer's Committee. The plaintiffs have signed the retainer agreements with these law firms that state that no agreements can be reached without a majority vote by the plaintiffs. The plaintiffs rejected the consent decree by a vote of 20 to 7 on at least two occasions.

This is a matter of Court record. Then these two firms suddenly stated that they were now class counsel for the putative class members. The Court consented to let the putative class members have their say about the decree via comment and vote. They have voted. Your Honor, to reject, I repeat, reject by a margin of 2 to 1.

And I understand that there were some questions about Akin and Gump's behavior and actions in soliciting some 28 approval votes. This is also a matter of Court record. I am now astounded to find out that Akin and Gump still wants the Court to approve the consent decree as being fair.

May I ask the Court, sir, who does Akin and Gump now represent? Themselves? The consent decree itself? Because the plaintiffs and the putative class have voted to reject the decree. Akin and Gump and the Washington Lawyer's Committee are counsel without clients. I cannot understand how or why there are still trying to force a grossly unfair and flawed consent decree on putative class members and plaintiffs who vehemently oppose it.

I understand that Akin and Gump have now indicated that by not voting or expressing a written opinion, putative class members are de facto giving support for the decree. The reasoning which is also flawed is that the consent decree packaged did not specifically solicit a vote. This is preposterous. Akin and Gump helped to cleverly word the decree papers not to solicit a vote, but the class voted anyway to reject.

I have personally 200 former and current black FSO's well over 100 in person and by phone. They overwhelmingly stated to me that the decree is unfair and should be rejected. However many feel fearful that the Department will retaliate against them if they voted to reject.

Many are also scared to testify here against the decree because of fear of reprisal. And, sir, this fear is well founded, because in the past the Department has retaliated against many of the plaintiffs and even putative class members.

Judge Sporkin, this decree in its present form is grossly unfair to the putative class and plaintiffs alike. It is supported only by the Department of State and Justice and of course, Akin and Gump and the Washington Lawyer's Committee.

It has been resoundingly rejected by those who it is suppose to help and defend. Sir, I implore the Court this badly flawed and unfair and unjust decree and place this lawsuit back on the litigation track. I thank you very much for the opportunity to speak.

THE COURT: Let me point something to you. If this case had gone -- If Judge Revercomb were still here, and I assume he would uphold his position that there is no class action here, where would you be then?

THE WITNESS: Just before his death and before you inherited the case, Your Honor, Judge Revercomb indicated that he would entertain the plaintiffs back and he'd revisit this.

THE COURT: Well, how many times did he turn it down, twice?

THE WITNESS: Twice. But then when we came back with about 27 or 30 of us, he said he would revisit it, because I don't think he particularly wanted to go through with 28 cases. And with your taking over the case, I think you were trying to get a settlement, and we're again at the point where we're having these same 20 to --

THE COURT: I understand that. But let's assume that he would have again rejected that, said, look, these thing have got to be proceeded by --

THE WITNESS: Well, then I would -- sir, I've suffered greatly because my cases have been held in abeyance. I would have then pursued my individual cases, and I think I would have won, because I think they're meritorious, and I would be okay.

THE COURT: Which would you still have the right to do if I approve the settlement and give you the right to opt out.

THE WITNESS: Those are several ifs.

THE COURT: Well, I understand what you're saying, though. Okay. Let's get the next -- time is running out.

THE WITNESS: Thank you very much.

THE DEPUTY CLERK: Cynthia Smooth

THE COURT: Thank you very much. I do appreciate it.

(Witness excused.)

MARY CYNTHIA SMOOT, SWORN

THE COURT: What is your name?

THE WITNESS: Mary Cynthia Smooth.

THE COURT: And where are you employed?

THE WITNESS: PG County Public Schools.

THE COURT: And when were you employed by the State Department?

THE WITNESS: From March, 1971 through September, 1987.

THE COURT: Did you testify in the preliminary hearing?

THE WITNESS: Yes, I did.

THE COURT: Is there something you would like to tell me? Where do you stand on this consent decree?

THE WITNESS: Oh, I reject it, sir. I've been a part of this plaintiff interveners for the past 10 years. I was the first female to sign on with the case, and we basically felt at the very beginning that we wanted to do something to improve the conditions for black officers within the Department in terms of assignments, promotions and appraisals, that the appraisals needed to be revised. That was our first concern 10 years ago.

Now, 10 years have elapsed and we feel that because of the time that has elapsed that we have been hurt tremendously, particularly those of us who have been selected out, those that may be facing selection out now because of the ongoing practices within the Department. And we feel that we ought to be fairly compensated, either in terms of promotions, reinstatement, back pay, front pay in lieu of reinstatement for those who have been selected out, because there is a pattern of discrimination within the Department.

THE COURT: Did you ask to be reinstated?

THE WITNESS: Sir, I was not given the opportunity.

THE COURT: You were not given the opportunity.

THE WITNESS: No. I was basically denied reinstatement. I was a tenured officer.

THE COURT: Do you know what you're going to be getting -

THE WITNESS: Yes, sir.

THE COURT: What you're going to be getting out of the settlement?

THE WITNESS: Yes.

THE COURT: Is it your position that you opt out?

THE WITNESS: Yes.

THE COURT: Is it your position you'll bring your own lawsuit?

THE WITNESS: Yes.

THE COURT: Do you have something pending now in the State Department?

THE WITNESS: Yes. I do.

THE COURT: And that's been held in abeyance because of this lawsuit?

THE WITNESS: Yes, it has.

THE COURT: Tell me a little bit about your -- you were tenured, right?

THE WITNESS: Yes, sir.

THE COURT: And then why were you phased -- what was your position when you were -- what was your rank when your position was terminated?

THE WITNESS: I was an FS0-4. I was tenured and not given a promotion at the time that I was tenured, which is extremely abnormal. But I'd like to go back just a little before that, sir.

THE COURT: As I recall you had a language issue?

THE WITNESS: No, sir.

THE COURT: It was not the language?

THE WITNESS: No, sir.

THE COURT: Go ahead.

THE WITNESS: First of all, I came in under the EEO program, which meant that I have a five year limited appointment, and the Department was to keep me an officer position for the five years, so that I would be competitive. That didn't happen. So I was granted an extension for two and a half years. I was about to be selected out when I met the director of the EEO office. He investigated my case, found out I had not been kept in the officer position. Therefore, the Department did extend my term for two and a half years.

After that, I eventually passed the lateral entry exam and was immediately recommended for selection out. Makes no sense. A few years later I was tenured in what, 12 years later after entry tenured by the State Department in '83, and I was in the --

THE COURT: I thought you said you were tenured and recommended out?

THE WITNESS: I passed the lateral entry exam.

THE COURT: Lateral entry and then you were --

THE WITNESS: Recommended for selection out.

THE COURT: Then what happened?

THE WITNESS: The next step --

THE COURT: You beat that?

THE WITNESS: I beat that.

THE COURT: Based upon a complaint, a grievance or what?

THE WITNESS: I filed an EEO suit. Actually the Department failed to review my file as they were required to do by law at that point. I understand from a formal personnel officer that the board met, never opened my file. Someone gave a statement concerning my corridor reputation, and it was voted upon to terminate my employment at that point. My file was not even reviewed.

When I heard this, and I had several people that approached -- key people in various positions and that was later overturned. My file was reviewed and I managed to say in the Department a few years longer. I was tenured in '83. I participated in the mid level officer program and recommended for selection out again.

I overcame that and was sent to an assignment in Mexico in which I had to file a grievance which I won, and in the process of filing the second grievance for that same two year period, I found out that it would cost another $12,000 to pursue my case. I had spent eight the year before, and at that point I said I agreed to let the Department select me out, because I was basically spending all of my savings fighting the Department.

THE COURT: What are you going to get out of the settlement.

THE WITNESS: Approximately $30,000. One major thing I did not mention, sir.

THE COURT: Is that total?

THE WITNESS: That's total. When we're talking about my having been out of the Department for nine years, having been in the Department for 16 and a half years, eight of those years, including for that 16 years, that 16 and a half years, I had approximately two years of training, so if we subtract that out of the 16 and a half years. Out of the 14 and a half years that were left, I had eight years over complement, which meant that I was out of cone. I was not in a competitive position, so how could I feel effectively compete for promotions?

My file is definitely flawed. I was not in a position to compete. And many times I was not even in an officer position. So I'm being penalized.

THE COURT: You say you brought an EEO complaint which is being held up?

THE WITNESS: Yes.

THE COURT: Was that brought -- you say you allowed yourself to be selected out, but did you file the complaint after you were selected --

THE WITNESS: No, sir. The complaint is ongoing. The hearings were to resolve that issue one way or another and at the cost of $12,000, it just was impossible. Now, what the major reason why I terminated those proceedings were that the office that I was in at the time found out that I was involved in this EEO suit. I came back to my office one day. I had five reprimands on my desk.

THE COURT: For what?

THE WITNESS: I don't -- we're talking nine years ago. I don't remember. But five reprimands in one day, and I men it was reprisal.

THE COURT: So you're saying you were constructively discharged.

THE WITNESS: Yes.

THE COURT: You know what that means?

THE WITNESS: Yes. I'm not sure. Go ahead and explain, sir. I want to make sure.

THE COURT: That means that you were forced out.

THE WITNESS: I was forced out, sir.

THE COURT: All right. Thank you. Next case. Oh you got a question you want to ask her? Go ahead.

CROSS EXAMINATION

BY MS. BUCHANAN

Q. Good afternoon, Ms. Smoot. You were selected out from the State Department, correct?

A. Yes.

Q. And as someone who was selected out, you were eligible to request consideration for an extra payment from Pool B funds. You're familiar with that concept in the settlement agreement?

A. Yes.

Q. And you did not apply to that panel for the extra funds; is that right?

A. No.

MS. BUCHANAN: Thank you.

THE WITNESS: May I say why?

THE COURT: Surely. You must state anything you want. You know that.

THE WITNESS: I felt this decree or consent decree was a joke, not worth my time. I was not going to give it any credence by asking for other monies, because I plan to reject it.

THE COURT: Well, $30,000 isn't a joke, is it?

THE WITNESS: It is to me, sir. Statistically we've mentioned the expert hired by Akin Gump is not here. And a statistical run was done in terms of front pay in lieu of reinstatement, and even at the grade level which I left the Department, if that were possible at that grade level, I would get approximately $800,000.

Now, if we looked at the monies that would be made available because of delays in promotion, for the discrimination in assignments that occurred to me, I would get somewhere between the $800,000 and a little over a million dollars. So the $30,000 or any other amounts of money that I might have received under this consent decree was a joke.

Secondly, it is not fair to the plaintiffs. We were basically excluded from promotions. None of us -- I don't think any of us are eligible for promotions under this that originally brought the EEO suit, sir.

THE COURT: Thank you very much. Next.

(Witness excused.)

THE DEPUTY CLERK: Dorothy Watson

THE COURT: How many more do we have here?

THE DEPUTY CLERK: Under opposed, four more.

THE COURT: Four more?

THE DEPUTY CLERK: I'm not including Ms. Watson.

THE COURT: All right. Ms. Watson

THE DEPUTY CLERK: Five in favor and one neutral.

THE COURT: How are you. Ms. Watson? Good to see you again.

DOROTHY WATSON, SWORN

THE COURT: Ms. Watson, what would like to tell me.

THE WITNESS: I don't think we have enough time here. I'll tell you some of the things. Where would you like me to begin? When I started with the Foreign Service?

THE COURT: I'm trying to save a little bit of time, because as you can see, we'll be going into night court in a little while. Let me see where we are.

I know you were here at the preliminary hearing. What do you think is the most important thing you would like me to hear?

THE WITNESS: Well, I think number one, the first thing I'm very concerned about is prospective relief, and I feel it's absolutely a boilerplate kind of document. It doesn't really speak to the problems and the issues of black Foreign Service Officers and how the State Department can correct its systemic discriminatory practices. And that is extremely important to me and to future black Foreign Service Officers. That is the main reason why I'm involved in this.

I retire in another year, and all of this certainly is not for my future, but if -- I hung into this case since 1985 when I first filed my first complaint and which has never been resolved, continued to be retaliated against simply because I had a corridor reputation, again, another one of those things that you didn't understand, the corridor reputation, because I had the nerve to file --

THE COURT: Oh, I didn't.

THE WITNESS: So I filed a complaint. It has never been resolved, and I was retaliated for it with my next assignment, which, by the way was not made through the system, had to be made by the Deputy Director General and when he sent me to my post, which was Ivory Coast, I arrived there, it was blatant discrimination.'

I was told, we know who you are. We didn't want you for this job, and I quote them verbatim. We had a man in mind, but now that you're here, we're not going to tolerate any of that discrimination nonsense coming from you.

THE COURT: So you were discriminated more as a woman than as a black.

THE WITNESS: No, no, both. No, it was both.

THE COURT: Are you part of the Palmer suit?

THE WITNESS: Am I part of it? No, I am not -- yes, I was part as a woman, yes.

THE COURT: Did you get a settlement out of that suit?

THE WITNESS: Yes, I got what they received of $5,000. They sent me a $5,000 settlement. They never asked me anything one way or the other, except whether or not I was a woman in the Foreign Service and felt that I had been discriminated against, and I said, yes.

THE COURT: Do you think you're being discriminated more for your race than your gender; is that it?

THE WITNESS: Oh absolutely, absolutely. The kind of discrimination in the State Department is blatant. And it is not something for us to continue to say that it is -- it could have been subjective. It is not. It is blatant. It is direct, and it is very painful. When I can tell you some of the painful things that has happened to me as a Foreign Service Officer, this is not something to just say $33,000, which is what they're offering me, is so far as I'm concerned, that's insignificant, irrelevant and immaterial.

THE COURT: You sound like my lawyers that appear ever day before me. How many years have you been with the State Department?

THE WITNESS: Since 1980, May 5, 1980.

THE COURT: So you've been there about 16 years?

THE WITNESS: Yes.

THE COURT: And you're ready to leave?

THE WITNESS: Yes, I am leaving because I am going to retire next August.

THE COURT: How could retire with 16 years?

THE WITNESS: I was in the government before. I came from another agency.

THE COURT: I see. Okay. So you'll have what, total how many years?

THE WITNESS: A total of 23 years altogether.

THE COURT: Okay. And so when you say it's blatant, tell me why you said that.

THE WITNESS: Well, when I was in Uruguay, and the reason I had to file my charge, I was the next ranking officer to head the administrative section. And the administrative officer was leaving, and there was going to be a three month gap between the arriving officer.

During that time, I was to serve as the administrative officer in charge of the section. And I was denied that opportunity by the ambassador, the DCM and the present administrative officer. And they insisted on sending back to Washington at an additional expense per diem, housing fare and bring down a male to serve -- a white male to serve as acting officer rather than let me serve. And I said to them, if this person arrived, I can assure you that I will file a charge of discrimination against, because they could not give me a reason as to why I was not being allowed to serve as the acting administrative officer.

He arrived on July 4, and on July 5, that Monday I filed a charge that has never been resolved. And a few months after that I had to go for another assignment, and I could not get an assignment because the word was already out at the Department that I was a troublemaker. So when I finally had to call he Director General's Office to complain about this, he assigned me to Abidjan. And all of this information went before me, and then when I arrived there, I was treated in the same manner as they did in Uruguay and I had to file another charge, which is still outstanding and has not been resolved.

I also filed grievances. And the grievances ruled it my favor, but it's like a Catch-22. They rule in your favor, but nothing happens except your file is expunged. So when your file is expunged of all of your evaluations, that mean that you have gaps in you file that when you go before the promotion board, you have nothing to show that you really did anything for a whole year.

So when you have three such gaps in your file, as I have had, it's impossible for me to have a P before my name and be promoted. So my problem is accepting this consent decree that I am not being at all treated in a very fair manner, because no one has considered what has happened to me. You're just saying, here is $33,000 and that's sufficient. And that is not acceptable for me.

MS. HUTCHINSON: Yes, she couldn't find file for Pool B.

THE COURT: She can't get in the other pool?

MS. HUTCHINSON: No.

THE COURT: All right.

THE WITNESS: My concern is I want whatever I would have received for the promotions that I would receive. I want the amount calculated into my retirement plan.

THE COURT: All right. Now, do you intend to opt out.

THE WITNESS: I intend to opt out if this consent decree is so written in stone as the gentleman has constantly said, and we cannot make any changes to make some kind of consideration for those of us who have worked all these years, for 10 whole years or more on this case, I definitely cannot accept this.

THE COURT: And then you would file you own lawsuit?

THE WITNESS: Absolutely.

THE COURT: All right.

MS. HUTCHINSON: I have a question.

THE COURT: Sure. Go ahead.

BY MS. HUTCHINSON

Q. Ms. Watson, do you recall attending a meeting concerning the prospective relief and the monitoring aspects of the decree with Mr. Kerry Kirkland during the processing of this settlement agreement?

A. Yes

Q. Do you recall as a plaintiff whether or not you agreed with or expressed any opinion to Mr. Kirkland about the prospective relief portions of the decree?

A. Yes, I did. That's -- this morning when he spoke and said that we had accepted what was presented to us, that's not exactly so. I think that I have spoken to every lawyer including Mr. Kirkland, involved about the prospective relief, and that this is absolutely very, very weak what is being presented to us. It's a boilerplate kind of relief, and I wanted it to be looked into and to include something that will give the State Department an opportunity to correct the way they are handling black in the Foreign Service and weeding them out and keeping them from moving ahead by putting them through this ridiculous grievance program and they have.

You file a grievance. You get punished, but nothing happens to the person who put you in that state. I asked him to please let me meet with him. I had five other officer who are presently in the State Department who wanted to bring him up to date as to what prospective relief should be about for Foreign Service Officers at the U.S. Department of State.

You cannot put he same thing in our prospective relief as you would in something for the Labor Department because we have a peculiar operation there. And this was never done. I called him at home twice. I was never -- the phone calls were never returned.

THE COURT: Thank you. Next.

(Witness excused.)

THE COURT: Let's take about a 10 minute recess.

(Recess.)

THE COURT: Mr. Thomas, we're going to pass you until the last witness. Is that fair enough? You'll be the clean-up batter?

MR. THOMAS: That's fine.

THE COURT: All right. Let's get to the next one. Next witness.

THE DEPUTY CLERK: Walter Thomas

THE COURT: No, no, no. I just said --

THE DEPUTY CLERK: I'm sorry. Ward Morrow. He's gone.

THE COURT: All right. Next one.

THE DEPUTY CLERK: Alfred Neal, Jr.

ALFRED NEAL, JR., SWORN
DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Mr. Neal, can you state your name for the record, and can you tell us how currently will this consent decree affect you in your position with the Department of State.

A. My name is Alfred H. Neal, Jr. Right now I'm in the process of being retired. I'm going to be involuntarily separated September 29, 1996. Currently I'm right now in a transition retirement program set up by the Department of State and as I said, as of September 29, I'll be involuntarily separated from the service.

I think my counsel had asked if it's possible to have my time extended pending the outcome or the final outcome of the case, but that request was not approved.

Q. Now, what is your current grade?

A. My current grade is I'm a Foreign Service Officer Class 2

Q. And are you being selected out because you haven't received a promotion; is that the situation?

A. I'm being selected out because I'm what they call in time in class and I have not been promoted in the requisite number of years. I was last promoted in 1986. An because it's more than 10 years without a promotion, an then I have to leave the service in the up or out system.

Q. In terms of this consent decree, were you one of the individuals who was considered for a promotion under this consent decree. I was given information to the effect that I would receive $29,000, and that would be all, and I specifically asked if there was a possibility that I was going to be also promoted. And they said, no, under this consent decree you would not be. You would only receive money and that was all.

A. At this point in time, no, I do not.

Q. Okay. Did you file as a plaintiff with this particular lawsuit?

A. I filed as a plaintiff intervenor. It was in 1988, if I'm not correct, while I was serving in Mexico City.

Q. And would you elect to opt out of this consent decree if the Court approved your --

A. As the consent decree is presently structured, yes, I would consent to opt out.

THE COURT: Would you bring a lawsuit?

THE WITNESS: I would bring a lawsuit and I guess I also would have counsel in order to do so. Yes, Your Honor.

THE COURT: How many years have you been in --

THE WITNESS: I've been in the Foreign Service since October 6, 1967.

THE COURT: 19 what?

THE WITNESS: 1967.

THE COURT: You don't look that old.

THE WITNESS: I have a baby face, sir. I have seven children and a baby face.

THE COURT: So you have close to 30 years.

THE WITNESS: Yes.

THE COURT: What was your best assignment?

THE WITNESS: I guess my best assignment was my first one. I was in Ethiopia in 1969. I had left the Peace Corps in '67, and that was my first assignment. I can into the Foreign Service through the Foreign Service JO program, which was trying to attract black officers. And I think I was the third or fourth officer under that program.

I guess to some extent my problems started then. I came in, and under the program, you had to within five years with a reserve appointment pass the Foreign Service exam, the written exam. Otherwise, after that five years you would have to leave the Foreign Service. I passed it in I guess two years and I'd already received a promotion. I was a Foreign Service Class 6. But went the sent in and informed the Foreign Service I had passed the exam, they were only going to keep me at the Foreign Service 7 level. So that was one level lower than one I had already attained.

And I was very concerned about that, didn't know what to do. Fortunately, my ambassador at that time was going to become Director General of the Foreign Service, so he in essence wrote himself a telegram asking that this young man who had just passed the Foreign Service and was doing well in it, should please be given additional consideration, and the State Department turned itself around in their decision and did allow me to continue at the grade that I was.

Now, if you were in a situation that you were trying to track black officers to the Foreign Service that would have been an indication of trying to after the person had already been promoted to at least keep him at the grade he was with consideration. Had the ambassador not written the telegram, I would have been at a lower step than I should have been.

THE COURT: What was the corridor talk about you? Anything? You had never filed a grievance, did you?

THE WITNESS: I finally filed a grievance in 1986, which I won. I think the corridor talk about me has not been good. I haven't been able to get an assignment since I guess 1989 of my choosing. I've been consistently told you have Washington or Panama which was in '89. I went to Panama because I didn't want to go back to Washington. And in 1991, I was getting ready to leave. I think it's 1994 I was told at the same time I was bidding on an assignment. Two lists went up. they said no, the posts are no available.

I said, well if you have an assignment perhaps like in Ethiopia or another assignment I mentioned that in case someone has a broken assignment. I'd be glad to take one of those. And as it was, I was able to get an assignment or at least the possibility for an assignment in Ethiopia because someone did break it. They got sick, couldn't go, I went in, applied for that particular post, Ethiopia, went up for it, and was the only bidder in the world for that assignment after it was broken. It got very close to them making a decision. All of a sudden the African bureau found another bidder. They found another bidder.

THE COURT: Where was he hiding?

THE WITNESS: I don't know. Nor do I know his name, but the bidder was then put together with myself on the review panel, and they had what they call a shoot out when you have two. You know, the African Bureau had an assignment and the Personnel Bureau had an assignment. I won the shoot out. So I should have been assigned. However, the African Bureau then went to the Director General of the Foreign Service requesting an appeal of their decision. And as a result of that appeal, I wasn't able to get Ethiopia, although I was qualified for it and was told --

THE COURT: Did the other person get it?

THE WITNESS: The other person I assume got it, and I was given Guatemala which had not been on my list at all. And I just recently came from Guatemala.

THE COURT: Why is Ethiopia much better than Guatemala?

THE WITNESS: In this case I guess it was kind of fond memories having first assignment. I got married there, had my first child there.

THE COURT: But it's not a better --

THE WITNESS: No, at the time it was just interesting because it was at my grade and it would have given me a different kind of challenge.

THE COURT: Guatemala wasn't at your grade?

THE WITNESS: Guatemala was at my grade, but it had not been on my list. I just didn't even know it existed.

THE COURT: I see. What was your duty?

THE WITNESS: In this case I was a consular officer. So in Ethiopia I would have been a regional consular officer in charge of giving advice to a couple of other embassies, whereas in Guatemala you were just in an embassy, only working under a different kind of challenge.

THE COURT: Okay. Thank you. Got a question? Sure, go right ahead.

CROSS EXAMINATION

BY MS. WATSON

Q. Mr. Neal, when you responded tot he proposed consent decree, did you indicate on that form whether you would or would not opt out?

A. At that time I did not say anything about opting out, but I do say so now.

THE COURT: You're going to opt out?

THE WITNESS: Yes.

THE COURT: And file your own lawsuit?

THE WITNESS: Yes, I will.

THE COURT: Okay. Thank you. Next.

(Witness excused.)

THE DEPUTY CLERK: Bisa Williams-Manigault

BISA WILLIAMS-MANIGAULT
DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Would you state your name for the record please and your position with the Department of State and tell us how this current decree would affect you if it were approved.

A. My name is Bisa Williams-Manigault. I'm a Foreign Service Officer Grade 3. I'm in the Economic Section at the U.S. Mission to the United Nations. I believe that the immediate effect of this decree would be to give me a little bit of money. They say I'm eligible for $11,000, I'm not sure if I'm eligible for the promotion or not. I'm not sure if I'd be among the 17 candidates, although it seems to me I ought to be.

However, if I were to be promoted as a result of this decree, my status would not bring me up to par with the status of my class members, the person that I came into the service, because they're already a grade and sometimes two grades ahead of me. So if I am promoted to the place where I should have been, then I'm still a promotion behind.

THE COURT: When did you come in?

THE WITNESS: I came in February, 1984.

THE COURT: When was your last promotion?

THE WITNESS: 1988.

THE COURT: And you haven't been promoted since then?

THE WITNESS: That's right.

THE COURT: You came in as a what?

THE WITNESS: I came in as a .05. Well, I came in as an 0-5 and went immediately to a 4 after about year.

THE COURT: And then where are you now?

THE WITNESS: And then I'm in an 03. I have two group superior honor awards, three meritorious honor awards, two letters of certification appreciation, a letter from the Deputy Secretary, and I'm being nominated now for another meritorious honor award.

THE COURT: Why is it you can't get a promotion?

THE WITNESS: I'm not sure, because I have been told that I have been recommended consistently for promotion, but the statistics are that I'm the political cone officer, and gradually as the Department has tried to equalize or regularize the percentage of non-political offices they want promoted, they are taking fewer and fewer. This is the rationale that's been given to me. I did ask somebody to look into it.

THE COURT: Now, your class, how many were in it?

THE WITNESS: Twenty-nine persons.

THE COURT: And can you give me the breakdown on –

THE WITNESS: No. I can't give you the specific breakdown of where everyone is.

THE COURT: No. I know. Can you tell me what was the breakdown on race?

THE WITNESS: Oh. Two black junior officers, two black mid-level entry level officers, and of the four of us. I was the only female.

THE COURT: One female. And the rest were white? In other words, 24—

THE WITNESS: No, no, no. Oh, of the 29 the rest are white. There were no Asians and no Chicanos.

THE COURT: So that would be 25, right/

THE WITNESS: Yes.

THE COURT: Does that sound right to you?

THE WITNESS: That sounds right to me.

THE COURT: Now, let's look at that class now. How many of the 29 are left, can you tell me?

THE WITNESS: About 26 or 27.

THE COURT: So—boy, you don't have much of a fallout, do you? Twenty-six left. How about the four, where are the four black officers?

THE WITNESS: I think one of the mid-level persons retired. I do think he left. All the rest of us are still in.

THE COURT: And have you all-where do you stand on your positions now?

THE WITNESS: I don't know frankly.

THE COURT: You don't know where everybody is? Now, what about he white people there?

THE WITNESS: I actually have more—it has happened that I've had either the same post or more interaction with some of the other white officers in my class. All the ones that I know are at 02 or 01 level.

THE COURT: 02's and 01's and you're still at 03, right?

THE WITNESS: That's right.

THE COURT: And all the rest are 02's or 01's?

THE WITNESS: I can't say that off all the entire class. It's hard to know because we go all over the world, Your Honor.

THE COURT: Well, you assignment is a pretty good assignment, isn't it?

THE WITNESS: I have a good assignment. I have had actually good assignments.

THE COURT: Why can't you get promoted? What seems to be the problem? Do you have to sit for tests or anything?

THE WITNESS: No, there are no tests. I think you've had the system described to you. Part of it has to do I think with our evaluation form and that I probably have not been the best reader of the language and the code language that's used in the form as to what will get you a promotion and what want.

The Palmer case indicated, the women's case indicated that I should have had a higher box checked, so I've had that addressed.

THE COURT: Oh, you received some compensation from the Palmer case?

THE WITNESS: They moved up a box from 1984 or '85. Actually it didn't mean anything to me.

THE COURT: You got nothing?

THE WITNESS: No, but I wasn't really looking for anything. In our evaluation form—they changed the evaluation form. I'm probably going to have to get other technical help for this, because I don't know the fully system. In an area where you have I think about five boxes to check whether or not this person is a good candidate for doing well in service, on one of my evaluations, I did not have one of the two upper boxed checked. I had the third box checked and that box got checked. I was promoted that year, though. That was my 5 to 4 year or something like that. But at any rate that happened.

THE COURT: Does she get a promotion in your deal?

MR. CONNELLY: Your Honor, she has not been notified that she would get a promotion, but the question that I wish I could have the answer to is have you been recommended but not reached by a promotion board?

THE WITNESS: That's what I understand.

MR. CONNELLY: You have?

THE WITNESS: I have been recommended but not reached.

MR. CONNELLY: Well, we'll check that, Your Honor, because it's possible that she may be eligible for a promotion under the consent decree if she's been recommended but not reached.

THE COURT: Where do you stand on the opting out?

THE WITNESS: I need more time to opt out. I came to this hearing because I was told this consent decree was going to apply to me whether I wanted it to or not.

THE COURT: That's a possibility.

THE WITNESS: Well, that's what I understand. That's why I wanted to know more about it. I didn't like the terms of it, because I felt that the compensation didn't represent what I thought—where I thought I should have been had things been more fairly undertaken. I'd have to really think about whether or not I have the wherewithal to pursue this independently.

THE COURT: And whether you have—how to prove your case I guess.

THE WITNESS: Right. Whether I even have a case.

THE COURT: In other words, your position would be that there is no other way to explain what happened to you other than the fact that there has to be some discrimination, and since you're in both the women's end of it and the racial end of it, you've got two prongs to go on, I assume.

THE COURT: Well, thank you very much. Next.

(Witness excused)

THE DEPUTY CLERK: Odie Fields.

MS. HUTCHINSON: He's already been called.

THE DEPUTY CLERK: He's asked to make an additional comment.

ODIE FIELDS, RECALLED

THE COURT: What would you like to say? You can stand right there, but I got to go on.

THE WITNESS: I just want to make a brief presentation, something that I was unable to do. As I have listened to the United States Justice Department attorneys and our primary legal team argue for a complete settlement of this case against our wishes. I am reminded of Sophocles

who said there is a point when justice is unjust. For as I understand justice, it must be fair, simple, humane, and most of all understanding.

Your Honor, the heart and soul of this case is that unless the person's black and has worked within the State Department's hostile white discriminatory environment, one cannot fully understand the malicious, degrading, concentrated and deliberate discrimination that we have been exposed to and what we have been forced to deal with on a consistent basis. But as you listen, you'll find a most definite pattern of horrible, callous acts of racial discrimination and retaliation.

The lawsuit could have been avoided is the State Department had adhered to the recommendations of numerous studies and reports dating back to 1945. The special efforts of then Secretary of State Dean Rusk who called civil rights leaders from around the country to appeal for assistance in brining in more Foreign Service Officers from racial and ethnic groups so the Foreign Service would be more representative of the American population.

It also could have been avoided if the congressionally passed 1946 Foreign Service Act which stated as one of its principal objectives to develop and strengthen the Foreign Service of the United States so as to ensure that the officers and employees of the Foreign Service are broadly representative of the American people and not manipulated the section of that Act that there are only two ways to enter the Foreign Service. One, which is the lateral entry mid-level examination process and the affirmative action laws to benefit white Foreign Service Officers.

Instead of leaving the program as one, they divided one-they were divided. One was quietly used for white male officers, whereas the other, affirmative action, was stigmatized as lowering standards, inferior, social experiment, and experimental. And we, black Foreign

Service Officers, who were employed through the program was labeled as less intelligent, less educated and poor performers.

Your Honor, I know you're rushed for time, but I'd like to say a couple of more things. There was a study done by the State Department, and it was done by Clark, Phipps, Clark and Harris, and they brought out a couple of very interesting things. And it brought out that although we as mid-levels and many of the people that—and even junior officers that came through the affirmative action program, we were castigated and maligned as being unintelligent and so forth, and we got poor ratings, and many of use were just basically run off our jobs.

And we were labeled as such because we took their oral exam. Whereas many of the white officers, although not all of them, came through the written process. But what came out in the report was that the only thing that the white officers had their advantage, if anything, was that they were test wise, and that they came from Ivy League schools.

But one thing that they did bring out was that those same individuals , the white officers, were, and I quote, "frequently had difficulty making decisions and getting along with people who were different." And I think that is the crux of the matter. Because you have an entrenched culture, white officers who don't want certain people within the system.

Now, you asked a question earlier, and I think you were trying to get to what is causing the problem? Sure, there is discrimination but there has to be a basis. And the white officers, the white male officers who have enjoyed the privilege and they've been entrenched in the system, and they don't want us around and they do whatever it takes to control our careers to their own advantage and eliminate us as quickly as possible.

The other thing I would like to say—

THE COURT: Could you hold off? I've got to get these other people.

THE WITNESS: Can I say just one more thing?

THE COURT: All right. Go ahead.

THE WITNESS: Because I came to this hearing. Your Honor, with great hopes, and because I was hoping that something could be resolved. And I would like to leave with the same idea that something is going to be achieved. And because I haven't really been harmed by what the State Department has done to me, and just as well as these other people.

Because we have a lot of courage to fight a case like this for 12 years, and we can all pat ourselves on the back. None of use have resorted to any kind of crimes and become criminals. And that takes a lot. We are the moral examples, because many of us have lost jobs, careers, and many of use are not even working, but we still try to stay out of the system in terms of becoming criminals and we're trying to do the best we can to be the good citizens for the young people who are coming after us. Thank you.

THE COURT: How many of the—can you give me some statistic if you could. There are 359 members of this group, is that it?

MR. SELLERS: 357. Your Honor.

THE COURT: What is the total professional group at the State Department? That's 357 out of how many? Can you give me that figure?

MR. SELLERS: No, I don't know it.

MS. WATSON: 4,500.

THE COURT: Who gave me that figure?

MS. WATSON: I did, Ms. Watson.

THE COURT: 4,500?

MR. BIRCH: I think there are about 4,000 at present Foreign Service Officers.

THE COURT: 4,000?

MR. BIRCH: 4,000 present Foreign Service Officers.

THE COURT: 4,000 or 4,5000?

MR. BIRCH: That's a range.

THE COURT: So, we're talking less than 10 percent.

THE WITNESS: It's not many. It's a revolving door concept. Your Honor. They bring us in, and they take us out the back door. Bring some in through the front door, and another group is going out the back door. Revolving door. We don't make it.

THE COURT: Let me see if I got this straight. There are 4,5000 and only 359. Has that figure changed over the past? I mean, has it increased?

THE WITNESS: Your Honor. I cannot honestly tell you, but if it changes at all, and let me give you a very interesting statistic that I have, and then I'll shut up. It's that at one time there were—I think there were 157 Foreign Service posts, no 257. You know how many black Foreign Officers there were at that time, 256.

THE COURT: I don't understand that. You say there were 257—

THE WITNESS: Two hundred fifty-seven Foreign Service posts, and 256 black Foreign Service Officers at that time. Because one of these things, Your Honor, that most people don't understand—

THE COURT: What's the point you're trying to—they have one for each post?

THE WITNESS: Well, we actually, Your Honor, I won't say one at each post, but many times that's what it turns out to be. Because we don't have as blacks, we don't have the same type of support and allies that the whites do. Many of use at every post, that I've been, there was only me. If I had a problem, I got to call home.

THE COURT: If you had a problem?

THE WITNESS: If I had a problem at the post overseas, I got to call home, you know, find somebody in Washington, call my mom, and this is one of the sad things.

My mom dies a few years ago, and she died wondering what's happening to her son? One thing I can say proud about my son is that my son he recently said, I'm proud of my dad because he's fighting them.

And even though—any my son, I'm supposed to be paying the way for him. He's having to pay my rent, and this is a sad connotation, very sad, and I did nothing wrong. Did my job, was recommended for all kinds of awards, saving American lives, and by the way, since this is a race case, all of those people were white people. The Colombians were trying to kill us. But I didn't look at them and say, I can't help you buddy. You know, you're on you own, because, hey, they're not after me.

THE COURT: Was this with the drug business?

THE WITNESS: Yes, this was down in Bogotá. I was assigned there. This was during the evacuation. And by the way. I was the one that engineered it. I was the one that brought them out, hiding people from the press in all kinds of disguises. But, you know, to the Colombians, if you don't know the sign, they blow everybody away. You know, you're an American.

THE COURT: This is when they took over the government buildings?

THE WITENSS: yes, I was there during the bombing. I'm out there risking my life saving other people under fire, gunfire. They weren't black, but they were Americans. And these people, while I'm out there risking my life, these people back here are firing me. I mean, you know, they said, well, we're going to give you an award, you know, for heroism, and all of this. And all of a sudden, nitch, I don't get it Superior honor, nitch, don't get it. Three meritorious honor awards. Didn't get it.

They keep doing it, keep doing it, keep doing it, maybe you get blown away. Thank you.

THE COURT: Thank you very much. Oh, you have a statistic to give me. Go ahead.

(Witness excused)

MR. ROBINSON; Ray Robinson. There are about 4,000 Out of the 357 they talked about, less than 250 are current active Foreign Service Officers.

THE COURT: 250?

MR. ROBINSON: Or less. And that constitutes about 6, something percent of the 4,000.

THE COURT: Is that figure up or down?

MR. ROBINSON: Oh, I'm sure it's going down?

THE COURT: It's going down?

MR. ROBINSON: Oh, absolutely.

THE COURT: Since the present Administration has been in, it's going down?

MR. ROBINSON: Yes.

MS. HUTCHINSON: Not according to this 1995 EEO report it didn't. They went up to 5,0000 in '95.

THE COURT: Whoa, whoa, whoa. Ms. Hutchinson, what are you saying now? What's going up and going down?

MS. HUTCHINSON: The total number of Foreign Service generalists, FY '94 was 4,877, FY '95 was 4,730.

THE COURT: And we still have the 357. All right. Let's get the next—

THE DEPUTY CLERK: Now shall we move on to those in favor?

THE COURT: All right. We're finished with all the people except for Mr. Thomas. Let's start getting—Mr. Thomas, we got to get some of the people in favor now. I said you'd be clean-up.

MR. THOMAS: Okay, sure.

THE COURT: Go ahead.

THE DEPUTY CLERK: Charlotte Williams.

THE COURTY: How many on this list?

THE DEPUTY CLERK: Five in favor and one neutral.

THE COURT: Okay.

CHARLOTTE WILLIAMS, SWORN

THE COURT: Good afternoon. I see you're opting in, right?

THE WITNESS: Yes, I am.

THE COURT: All right. Can you tell me why you're opting in?

THE WITNESS: I think that after 10 years it's time to move on to simply realize that the second section of this is more important or as important as the first part. The Department ahs to be given some chance administratively to prove that at least it's wiling to try and if it isn't willing to try, then it's up to you to yank their cord.

THE COURT: Up to me?

THE WITNESS: It's up to you as the Court. Sorry about that, but it's the truth.

THE COURT: What do you do for the Department?

THE WITNESS: I no longer work for the Department. I'm one of the untenured junior officers, and at the moment, I am not working at all.

THE COURT: What were you doing when you were at the Department?

THE WITNESS: I was a political cone officer, and I worked in Haiti and then I worked in Refugees.

THE COURT: Did you do anything in the Personnel Department?

THE WITNESS: Nothing at all.

THE COURT: Would it be helpful—you know, I'm getting these—would it be helpful I'm just thinking what would be a quick fix to deal with some of the problems that have been outlined here today? I know that there is not a lot of room to maneuver, but it seems that the grievance process doesn't work too well. It seems that these things aren't—would it be helpful to have somebody there're that you could go to informally who could find out why the promotion

didn't take place or could somehow look into a matter, sort of like an advocate for the person who's been allegedly—believes they've been discriminated against.

THE WITNESS: You're talking about the use perhaps of an administrative ombudsman?

THE COURT: Something like that.

THE WITNESS: I think that has merit as long as that ombudsman does not and is not really holden—beholding to the Department and that the Department does not feel that they can manipulate the ombudsman. There has to be a certain amount of give and take there. And I'm not sure at this point—well, I certainly would hope the Department would be willing to do that, and I think that's why this second section of this case I think is important.

THE COURT: Would that concept—

THE WITNESS: I think that concept has some merit. I don't know whether the Department has looked at—I have not been in the Washington area in the last eight years. So I mean, I'm not sure what the Department has been doing in that area, but I think it does have merit as a short range fix.

It also offers the option of using an outside party or an independent party, nor necessarily outside, but an independent party, and I think that's one way of sort of sorting through some of that. Where it ties into the senior management or where it ties into changes that need to be made in the administrative culture is something I can't say at the moment. I don't know. I've got to think about that one.

THE COURT; Okay, thank you very much. What are you getting under the settlement?

THE WITNESS: I'm getting things out of several pools.

THE COURT: Several pools. The women's pool?

THE WITNESS: No, I'm not getting nothing out of the Palmer case.

THE COURT: But you got a couple of pools here?

THE WITNESS: Yes.

THE COURT: All right, thanks.
MS. HUTCHINSON: Your Honor, could—
THE COURT: Sure, go ahead, You can ask.

DIRECT EXAMINATION

BY MR. HUTCHINSON

Q. What do—you say that you think that the prospective relief is important. What do you think this consent decree will do for the failure of minority officers to be promoted at the Department?

A. Well, my initial concern was tenure, because I was not tenured, and I do feel that there has been some change on that. There needs to be more done on that. I think as far as promotions go, it's sort of a two-edged sword. One of the things I think has to be done is the people have to look at what is on the formats and I understand the format has been changed for the evaluation. And I understand that has been done already.

I mean, collectively people are going to have to look at what is said in there and if the diversity training is, in fact, effective, it should address some of the code words and other things which are used to define black officers.

And in my own case, I mean, one of the things that was done was I was told black officers never learned to write. Well, I'm sorry. I turned that around, and I made it a point to learn to write. And I think sometimes that has to be done.

Q. In terms of assignments, what do you think this current consent decree will do for the failure of black officers to receive assignments?

A. I'm not sure that at this point it's there to be addressed. I did not remember reading it in there. However, that is another form of systematic change that I think the

Council for Workplace Diversity is going to have to attack head on. This is where you're going to run into the old boys versus reality.

Reality is that if you don't have officers, regardless of color, who are willing to go out and deal with what you are dealing with in a number of countries, it doesn't matter where you assign people. You're not going to get quality folks there to do the work. So I think that that's one of those issues that the Council for Diversity is going to have to address, and they are going to have to make that charge not necessarily a decree.

I think that's one of the reasons why you need to move into the second phase to see what, in fact, does come out of it. Can they make that change.

Q. Can I ask you one more questions. Did you seek reinstatement?

MR. HUTCHINSON: thanks.

THE COURT: Next.

(Witness excused)

THE DEPUTY CLERK: Bernard Jones.

BERNARD JONES, SWORN

THE COURT: State your name for the record.

THE WITNESS: My name is Gernard Johns, J-O-H-N-S.

THE COURT: And are you presently with the State Department?

THE WITNESS: No, I was constructively discharged in July of 1990 after 23 years in the State Department.

THE COURT: And you're opting in?

THE WITNESS: I'm opting in, which is not to say that I consider this settlement fair. I'm opting in because of personal reasons, financial reasons. I'm bankrupt. I cannot endure another five years of litigation. I have outstanding

financial obligations that I have to meet immediately that involve my family and my own health; and, therefore, I decided to opt in for that reason.

THE COURT: What are you getting out of this settlement?

THE WITNESS: I'm getting I believe $83,000.

THE COURT: Do you feel you were—you say you were constructively discharged, is that it?

THE WITNESS: Yes. That 83 involves 60,000 out of the Pool B for those egregiously affected by discrimination and the remainder from Pool A which was the question of delayed promotion and back pay.

I joined the Foreign Service in October, 1968, and received one competitive promotion in 18 years. During that entire period, I in many instances experienced racial discrimination. I filed a grievance in 1978 and with Walter Thomas I was the other named plaintiff, et al. in this class action suit in 1986.

Even before the filing of the class action suit, when officers –black officers met at the Joint Center for Political Studies where we discussed the question of filing a class action lawsuit, already before that October, '86 we had received directly a reaction who contemplated—who were active duty officers who contemplated filing a class action suit.

I was told specifically though an intermediary of the Director General George Vest at the time, that if I filed a lawsuit I would never again be promoted in the Foreign Service. In September of 1986, and I have copies of the memoranda and the E-mail, I was told—I was informed through this memorandum from Ambassador Swing to the Director General that no bureau in the entire Department of State would accept me voluntarily for an assignment because of my testimony of the Hill before the Government Operations Committee about racial discrimination in the

State Department and previous testimony before the Habib Commission in 1979 on the same question of the status of minorities in Foreign Service.

I don't consider this settlement fair because if does not contain in the prospective relief portion any accountability mechanism. That is the prospective relief essentially other than the consent decree itself and its essentially other than the consent decree itself and its enforcement, if it is enforced after these statistics are complied, after a period of four years, then the question of accountability will come into play. But in the interim four discrimination against the officers.

Indeed, the current prospective relief for those of us who have been in or were in the Foreign Service for almost three decades reflects regulations that ware already on the books and have never been enforced in the 23 years that I was in the Foreign Service. So essentially we are providing in this consent decree boilerplate that is a regurgitation f regulations that previous Secretary's of State have said they would enforce, but never got around to doing. And that included in my case five Administrations.

Indeed, if one would examine chapter and verse of the consent decree prospective relief, we would see that there is nothing in there that the Department has not said it would do in the past.

THE COURT: Thank you. Next. Thank you very much. You're very helpful.

(Witness Excused)

THE DEPUTY CLERK; Lisa Ruth Layne.

THE COURT: How many more do we have?

THE DEPUTY CLERK: Two more in favor and one neutral.

LISA RUTH LAYNE, SWORN

THE COURT: What's your name?

THE WITNESS: My name is Lisa Ruth Lane.

THE COURT: Now, you're opting in?

THE WITNESS: Yes.

THE COURT: Is there a reason why?

THE WITNESS: Yes. If you excuse me for sounding nervous, it isn't really nerves. It's more like anger. I am one of the plaintiffs in this case. I have been a plaintiff in this case since 1988. I have traveled numerous times to Washington, D.C. and met with our attorneys, and still I have listened to many other plaintiffs of the case say that plaintiffs do not support it.

I totally support the case. I'm a plaintiff. Right now it is a case of plaintiff against plaintiff against the U.S. Department of State. It is not Akin and Bump versus plaintiff. Akin and Gump, they represent me.

Everything id marching on before us. Affirmative action is being hit hard, our churches burning, racism I rearing its head. Right now, with the implementation of the relief that started with the initial fairness hearing, we have begun a fight against some of the injustices that are in the U.S. Department of State. I say some of the injustices, because as far as I'm concerned, there is no amount of money that can undue what the State Department has done to me or my family.

I believe there are still good people and professional people in the State Department, but I believe that the system if flawed, I believe as Mr. Kirkland said earlier, we cannot predict if something is going to succeed of not. If we could, we would all have crystal balls and w wouldn't be in this courtroom.. We'd be earning money doing something else, predicting. We can only try.

To me, the most important aspect of the settlement is now the State Department must say what is a Foreign Service Officer. What are the standards that a Foreign Service Officer must stand by, and that it must apply to everyone? We can only change the system. It's going to take years, decades to change some of the prejudice that goes on.

THE COURT: Tell me again about yourself. As I recall, you were terminated, weren't you, back in--

THE WITNESS: August of 1988.

THE COURT: And that was because of the language? Were you the one with the language training?

THE WITNESS: No.

THE COURT: I still can't find the language training. I remember your story. Would you refresh my recollection.

THE WITNESS: I was terminated for failure to meet the standards of my class, that I couldn't write, and I was inarticulate.

THE COURT: I can't find anybody more articulate. Go ahead.

THE WITNESS: Whenever I appealed, they say—as some people have testified, your career can go off track and get back on track. I mean, that happens to anyone, whether you're black, white, Asian. It seems to happen more to black officers. But that's very hard to prove.

When I entered the Foreign Service in 1974, I entered as part of the Minority Plan. When I passed my lateral examination in 1977, I had to wait until I was at least 30 years of age to be tenured. In 1980 I was eligible to be tenured. I was finally tenured in 1983.

From then on I was eligible for promotion. I was not promoted. After some difficulties in Haiti with my immediate supervisor, which I actually fought in the Department and lost,--

THE COURT: As I recall, it was a harassment case, wasn't it?

THE WITNESS: No, actually no one could really figure out what it was. It was a special review board hearing, and my selection out statement comple4etl conflicted with my low ranking statement, and then the differences were never reconciled,, I fought it. I lost and I left the State Department in 1988. And at the time I left the State Department, I had recently adopted two children.

THE COURT: What are you doing now?

THE WITNESS: Right now I'm a clinical ethicist and patient representative at East Orange General Hospital.

THE COURT: Thank you very much. You wanted to ask her something? What would you like to ask her?

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. In terms of this current consent decree, how will it affect any promotion relief that you might have been entitled to? Did you receive promotion relief?

A. No, I didn't. I was not eligible to participate in promotion relief, because I was a tenured officer.

Q. Okay. And in terms of the termination damages, did you participate in those?

A. Yes, I did.

Q. And so you got a letter like everybody else saying that you were entitled to that. Now, will that affect any of your retirement entitlements, this money that you're receiving?

A. No. I already received it when I left the State Department in 1988.

Q. And had you ever filed a complaint of discrimination during the time you were employed with the State Department?

A. Yes,, I did. Two.

Q. And are they pending?

A. Yes, they are. They were put on the back burner for this case.

MS. HUTCHINSON: Thanks

THE WITNESS: May I just say I do not—with the settlement of this case, I do not intend to pursue them.

MR. HUTCHINSON: Well, you won't be able to I don't think. I don't know.

THE COURT: You understand that. You won't be able to pursue them. She's right.

THE WITNESS: I understand. And I also at a time—

THE COURT: You can't settle and then do that at the same time.

THE WITNESS: I agree. And I did not wish to the Foreign Ser vice.

THE COURT: I got you. Thank you.

(Witness Excused)

THE COURT: next?

THE DEPUTY CLERK: Edith Spruill.

EDITH SPRUILL, SWORN

THE WITNESS: My name is Edith Spruill. I'm an untenured junior officer. I'm here to support the consent decree. I've read it very carefully and all the other documents, and I feel at this particular time that it is the best thing for us, for us as a class as a whole.

THE COURT: Are you still with the State Department?

THE WITNESS: No, I'm not with the State Department. I left the State Department in 1991.

THE COURT: Were you selected out?

THE WITNESS: I was, untenured junior officer.

THE COURT: You mean you got out before the five years; is that right?

THE WITNESS: No, I stayed through the give years, and then because I was not tenured, I exited.

THE COURT: So were you only there for five years, is that it?

THE WITNESS: Yes, I was there for five years.

THE COURT: And you left in 1991?

THE WITNESS: 1991.

THE COURT: Why are you supporting the settlement?

THE WITNESS: Well, first of all, I've read it very carefully, and I think that it allows as least something for a number of people. At least 200 some people will get something thought the promotion relief. There is something for people still in the Department. Some people—

THE COURT: What are you going to get out of it?

THE WITNESS: A few things I think. I get a few monetary gains, but I don't see a reason really to continue to drag it on. I think that it's beginning to divide us as a group, and the other thing that really concerns me is that when I first became involved with this, I was told that this is a class action suit. And as I've attended a number of these meetings, it stared to dwindle, and I really became confused at one point because I didn't know if it was a class action suit or if this is something strictly for the plaintiffs.

If it's something designed to help a larger number of people, then I think that we should look at it that wau and make it very clear that to everyone that this is looked at as a class action and that this is something that will benefit a number of people.

The other thing is that I think that with the signing of the consent decree, this puts the State Department on notice. This tells the State Department that it can no longer conduct business as usual, that there will be people watching, that the Court will be watching. And it also I don't think does much for the Department's image overseas to have something like

this to continue to drag. I think it's better to just go on and complete it and get it over with and be done. That's basically it.

THE COURT: Have you filed any kind of complaint?

THE WITNESS: No, I have not.

THE COURT: In other words, you made no grievance or filed a civil rights complaint - - a discrimination complaint?

THE WITNESS: No, and I don't intend to opt out.

THE COURT: Okay. Thank you very much.

MS. HUTCHINSON: Can I ask her a question?

THE COURT: Certainly may.

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Ms. Spruill, were you recommended for reinstatement under this consent decree?

A. Do I have the option of objecting to questions.

THE COURT: Yes.

THE WITNESS: I object.

THE COURT: Why would you object.

THE WITNESS: I just don't want to.

MS. HUTCHINSON: Well, she was recommended for reinstatement and she did not indicate that to the Court when she stated the - - answered the question concerning what relief she was entitled to. As far as I know, Your Honor, and - -

THE COURT: Well, you don't want to be reinstated; is that what you're saying.

THE WITNESS: No, that's not what I'm saying. It's just that I just chose not to say that. It's not a real big secret, but also - - actually it's a good thing that you brought this up, because she does not represent me. She represents certain members of - -

THE COURT: I know that. But she's just trying to do her job, and she's entitled. But I think we ought to get it clear. Are you going to seek reinstatement or you're not seeking reinstatement.

THE WITNESS: I did seek it.

THE COURT: Oh, you did seek reinstatement. I got you.

BY MS. HUTCHINSON:

Q. So you accepted reinstatement from the Department?

A. Yes, I did.

Q. As a part of accepting reinstatement, did you have to forego any monetary damages or relief?

A. No.

Q. So you're getting monetary relief and reinstatement relief, am I correct?

A. Yes.

MS. HUTCHINSON: Thank you.

THE WITNESS: Would you like to know how much?

MS. HUTCHINSON: No.

THE COURT: Thank you very much.

(Witness Excused)

THE COURT: Any further - - Linda.

THE DEPUTY CLERK: Yes, Your Honor. We have Robert E. Watkins, Jr.

THE COURT: All right, Mr. Watkins. Is he the last?

THE DEPUTY CLERK: The last of those in favor.

THE COURT: And then we have the neutral?

THE DEPUTY CLERK: Then the neutral.

THE COURT: All right.

ROBERT E. WATKINS, JR., SWORN

THE COURT: All right. You are Robert Watkins.

THE WITNESS: Yes, sir.

THE COURT: And what do you do for a living Mr. Watkins?

THE WITNESS: I'm presently unemployed. I have been unemployed approximately 10 years.

THE COURT: And that's since you left the State Department?

THE WITNESS: I have held semi-minimum wage jobs on a couple of occasions. I worked as a security guard.

THE COURT: I see. But when you were with the State Department?

THE WITNESS: Ten years ago.

THE COURT: And for how long had you been - - when did you first got to the State Department?

THE WITNESS: 1979 I think it was.

THE COURT: And you left when?

THE WITNESS: 1984.

THE COURT: So you didn't get tenure; is that what happened?

THE WITNESS: That's correct.

THE COURT: I take it you're going to be in favor of the settlement?

THE WITNESS: If I can preface my remarks, I'd like to say that I'm in the unique position of agreeing and supporting virtually everything that's been said prior to this, but due to financial circumstances, I am unable to opt out of the settlement.

THE COURT: So you want to take whatever monetary relief you're entitled to; is that it?

THE WITNESS: Okay. If I may, I'd like to make a request of you, Your Honor.

THE COURT: Sure.

THE WITNESS: I'm one of the individuals who was eligible fore reinstatement; however, I wasn't to chosen to be reinstated.

THE COURT: I see.

THE WITNESS: I have I guess you call it a complaint if this is an appropriate forum that I can bring it up. This is against the review panel. I don't know which criteria was used by the review panel to determine who would be reinstated and who would not be reinstated. But on the review application, according to the stated criteria, I think that I'm more than qualified to be reinstated.

For example, I was a Foreign Service Officer for over 14 years. I think I hold the record.

THE COURT: Well, I thought you said five years.

THE WITNESS: No, I served for 14 years.

THE COURT: Well, now I'm confused. I thought you said from '79 to '84.

THE WITNESS: Okay. Maybe I got my dates mixed up. But I served as a Foreign Service Officer for 14 years. During that period - -

THE COURT: Is that from '69 to '84?

THE WITNESS: I'm sorry, Your Honor. It's been over 10 years, so my dates are not proper, but I know how long I served. If I may continue during the 14 years that I was a Foreign Service Officer, I received approximately 20 recommendations for tenure and promotion. Now, just on those two criteria alone, I think I was more than competitive with the officers who were chosen for reinstatement.

The reason why I'm raising this issue is due to the fact that I cannot afford to not be reinstated or not to be employed. As I've said, I've been unemployed for over 10 years, and I was unjustly separated from the service. As a result, I haven't been able to gain tenure, et cetera.

Now, even though I'm in the unique position of supporting my colleagues who choose to opt out of this settlement, I can't afford to opt out myself. And as I said, I

don't' think I was treated fairly by the review panel. I may be wrong. If I'm wrong, then I apologize. My request to you, Your Honor, is that you look at the criteria or that the review panel be requested to present their documentation and state how they came to the conclusions which they came to. Because I feel that I was more than competitive and that I should have been one of those reinstated.

THE COURT: Thank you.

(Witness excused.)

THE COURT: All right. Do we have someone else?

THE DEPUTY CLERK: Earle Scarlett.

EARLE SCARLETT, SWORN

THE COURT: What is your name?

THE WITNESS: My name is Earle Scarlett. I'm a Foreign Service Officer at Department of State. I've been in the States Department in 19 years and 11 months. I am n FSO-1 political officer.

THE COURT: And you're taking a neutral position on this settlement; is that correct?

THE WITNESS: Yes. There are two things that come to mind. First of all, if one were to opt out at this time, this could be problematical because of the uncertainty of the political climate in the coming months; i.e., we're facing elections. There is a debate on affirmative action, et cetera. So there is a high degree of uncertainty as to what might transpire in the coming months.

On the other hand, accepting the settlement could conceivably make one vulnerable to future actions against you. Because as I understand it now, there appears to be no protection for officers who might accept that at this time. I must say that I've been away out of the country for the last year. I just came back from Sarajevo, Bosnia, so I didn't

have much time to focus on this debate, but I'm actually on leave at this moment, and I've come in because of my great interest in this class action suit.

But I must tell you, Your Honor, that I've been particularly concerned about the situation of minorities in general and blacks in particular in the foreign Service from my entry into he service. I'll state the facts and you and infer from what I say.

When I joined the Foreign Service in 1976, August, I was the only black in the class, and was I think 42. My peers at that time told me that I would be the first, and this sounds like a bit of a bombast, but I'm not going to have false modesty in front of this Court. My peers told me that I would be the first of my group to be an ambassador.

I took the first mid-level officer's course. The first one in the Department, and my peers and my instructors selected me to give the valedictory speech for the first mid-level course on the seventh floor of the State Department in front of the Deputy Secretary of State.

I've had numerous assignments and I must tell you that some of the speakers here are my personal friends and some of them I've served with, and I have a great respect for them. And I'll mention them in particular as I come to each setting.

I have had assignments on the Somalia Desk. I've served on the China Desk during Tiananmen Square and covered Tibet in that part of the world. I was in the Philippines during the revolution that overthrew Ferdinand Marcos. I served in Yugoslavia in 1990 to '92 during the disintegration of Yugoslavia. I returned to Bosnia, first to Belgrade last year to direct - - to be the deputy head of a mission that kept the Bosnian Serbs and the Bosnian - - and the Serbs in Yugoslavia from getting aid across this long border from the Adriatic through the mountains of Montenegro.

And I went from there and served on the high representative for the Dayton Peace Agreement settlement in Sarajevo for the past seven months, where I worked seven days a week, a minimum, and I stress this, a minimum of 14 hours a day to promote what is in the U.S. interests out there in Bosnia. I say this not as self praise, but to give you a sense of the diversity of my particular career.

THE COURT: You were working with Holbrook, Ambassador Holbrook?

THE WITNESS: I worked for Carl Bilt, the high representative for the civilian implementation of the Dayton Peace Plan. I was one of four Americans on his team, a team comprised of 25 diplomats from various parts of the world on the Bilt team. I was selected by Carl Bilt, and the Department of State agreed and allowed me to serve there.

But that is a bit of self praise. Let me see if I can address what I think is a central concern here today. First of all, any cursory look at history can tell you that the Foreign Service establishment was really relegated and dominated by a certain social class, a certain ethnic background, a certain regional origin. This is not a question of debate.

And the troublesome thing about this is that some people thought at that time that only these people were imbued with the capability to represent the diverse United States. Some vestiges of that still persist in the Foreign Service establishment. And I say the Foreign Service establishment broadly speaking. But let me interject, by the way, that there are some eminently impeccable characters of all hue in the Foreign Service. White colleagues who stand up for principle, and I know many of them. I've served with many of them, who stand for none of this rubbish.

But I must confess at the same time that lurking in the sinews and the belly of the Department and in the system are those who still adhere to some of these vestiges of

inequity. And that's what we're discussing here today. I'm not really interested as much as some might be about the compensation that might come to me as a result of this lawsuit.

I will tell you this, and I will give some concreted examples that are irrefutable and can be presented in this Court if necessary about the systematic attempts at discrimination and inequity in the Foreign Service. And I've spoken out about this before, Your Honor, and it has not done me a great service, I must tell you this. And I must tell you this, that I come here today with a degree of trepidation about that, because while there are, as I've said people of fine quality in the Foreign Service of all hue, there are those also who are in the woodwork and they eat away as termites do the fabric of our institution.

And I'll tell you this, you know the United States is facing a situation now of a contracting world. The bipolar world has ended, and I'll tell you this, part of the problem we have in solving the current problems we face today is largely due to a perception and a mindset that persisted, that existed before.

For example, I'll give you a current one, tangential comment. In the case of Bosnia, in the case of Eastern Europe, in the case where ethnic conflict now preoccupies the world, those people who are armed with the analytical tools to analyze the state of affairs of the world during the Cold War never developed those tools to analyze ethnic conflict that is eating away at many societies throughout the world.

And a large part of the inability to handle these questions stem from the very selection and perpetuation of a certain group to address these questions, which they never developed the tools to address. You had a few black Americans who were in the service in those days when I came in, and I told you I was one of 42. Many of them were

sent to Africa, and in Africa, in spite of the difficulties in Africa, one thing you learned is you have to understand ethnic differences, because the nation state was at stake.

It's a similar situation today in Bosnia. It's tribes, whether they be in Europe or in Africa. So I think it's perplexing. In fact, I'm in dismay that in 1996, July 15, we should still be having this discussion about representatives of a fine institution that we should be of the Foreign Service.

We represent the cutting edge. We are the people on the line, and every American with a talent and capability should be given access, the chance and he should have the right like everybody else to falter now and then. Nobody is perfect in this system, and I see them daily. People in high pompous position, inept, feckless, and they're still have positions of authority. And I see people here who I know from experience having worked with them who are fine talents are denied this opportunity.

It is a disgrace. It hurts me to come here to this Court to discuss this. And I'll tell you this, I'll give you concrete examples. I was once assigned, the State Department, you know, this is going to hurt me in any event what I'm saying, but I'm saying it anyhow. I remember when I was assigned to USUN, and I bid on the job in September, and I had other options. One of them was to be political consular in Nicaragua and elsewhere. They're fine jobs. And I wanted to go to the UN.

My wife is a Foreign Service Officer with USIA, and she landed an assignment in New York which is my hometown, where my mother and family live. And I bid on that job, and I waited, waited, and came March of the year when every job that I was vying for had dried up, and they called me. I was a Dean Rusk Fellow at Georgetown at that time, where I did a study on this very matter we're discussing, by the way, which was also published but never attributed to me in any way.

In any event - -

THE COURT: I think we found the fellow who wrote Primary Colors.

THE WITNESS: Thank you, Your Honor. Your sense of humor is well taken. Plagiarism is rampant. Anyhow - - in fact, it's rife. But back to what I was saying. In March, and I know we should inject some humor in this, and it sounds like a soliloquy.

But just let me give this concrete example, because someone is going to say I'm speaking like a professor in a theoretical manner. But, in fact, I live it on the line. I just came from the cutting edge of this business.

After I bid on the job in September and when they called me at Georgetown in March and told me that the job I had bid on, they waned to know if I was still interested in the job. I said, this is a weird sense of humor. This is March. I've lost everything else, But, of course, I went into what they call the shoot out in the State Department on a Friday, and the candidate advanced by USUN went into the shoot out with me and I defeated him overwhelmingly.

And my wife was then assigned to the Foreign Press Center New York, and she and I on April 15, and I remember it vividly, because I mailed my income tax on that day in New York City, and went to New York by train and she was well received in her new job at the Foreign Press Center, and when I went into USUN, the incumbent in the job took me to the United Nations in the third committee where I was supposed to sit and represent the United States in this turbulent Castro bashing exercise at that time.

And after I had that interview and so forth and went to the schools to get my children enrolled, I looked at housing and so forth, and when I went to see my prospective boss, he said to me, I don't know why you're here. You have no job here. I said, I beg your pardon? I was paneled for this job, and I was - - the Director General's office called and made appointments to make sure there was no selected memory applied.

And the man said no. And in the midst of this conversation, Your Honor, at half past 4:00 in the afternoon of Friday afternoon, April 15, I got a call from the State Department saying, Earle, I'm sad to say, but your job has been cancelled and you know longer have that job. And I said, but what? And they said, when you come to Washington, we'll discuss it.

When I returned to Washington, and in essence, the Department caved in to the request of the then ambassador in New York, even though I defeated his candidate in the personnel system, doing everything that is required to be fair, just and proper in the State Department and they took it away from me.

I'll give you one last one.

THE COURT: What happened?

THE WITNESS: I was out of a job, and my wife's job had to be cancelled, and it caused a big brouhaha.

THE COURT: Where did you go?

THE WITNESS: I went to the Virgin Islands and took a holiday. What would you do in this situation? I had no job, I was in St. Croix. This is nothing fictitious about this. When I tell you this, these people think it's fiction.

THE COURT: You didn't have a job. Did they assign you elsewhere?

THE WITNESS: I had no job, Your Honor.

THE COURT: For how long?

THE WITNESS: I took a vacation. I came back from the Virgin Islands and I was in New York where I had hoped to be visiting my mother, and I got a call from the State Department. This was like about a month later that there was a position that I was being considered for in Brazil.

Now I'd served in Brazil before, and I know the country very well, as I always do on all my assignments. And they wanted to assign me to Recife, and my wife was

going to Rio de Janeiro. Anybody who has any sense of the continental breadth of Brazil recognize that I'd be working just to pay the airlines.

So, in any event, that was a loss of mine. That was a tragic affair. And I have never really recovered from that trauma, because it rippled through my family in New York and so forth.

THE COURT: Who got the job?

THE WITNESS: The chap whom I defeated. That's the point of the story.

THE COURT: Was that a white person?

THE WITNESS: Your guess is accurate.

THE COURT: And was this Ambassador Allbright that did this?

THE WITNESS: I'm not calling names I'm not going to call names here. I think it's improper for me to call them. But one last one. I'll give you another one that you might think is just a little vignette to sound amusing. But it's not. It's actually endemic.

I had an EER written on me when I was on the Somalia Desk. Now, listen to this one. You would think this was actually funny. The rating the officer wrote on the second page of the EER the following. And I have it, by the way, at my chair. He put an asterisk on the second page in the top righthand corner in an inadmissible portion - - the place that is not reserved for that type of commentary. He placed an asterisk there saying that this officer under normal rating in the Foreign Service would be rated as excellent.

But in light of the inflation of grades in the Foreign Service Journal, see Foreign Service article so-and-so, I am rating this officer satisfactory.

THE COURT: Oh, my gosh.

THE WITNESS: You know that satisfactory in the Foreign Service is a way out. So it's a way out of the system. Then the reviewing officer who wrote his review and concurred with that. And I knew it was inadmissible, but I

risked my own reputation to prove these matters. It went to the review board, and they all signed it. And don't tell me I can't show it to you. It's right over there. They signed it, right?

It is not until it went to the promotion board that someone saw it and guess what they did. You thought they might have done something in my favor. You're wrong again. What they did was they - - you know that thing you take to whiten out typing. I never know these words. White-out that's what they call it. The took the White-out and they whited out that area where this asterisk and this sort of inadmissible commentary and they whited out the asterisk and the corresponding box and left the X in satisfactory.

Well, you know when I learned about this? On my way - - you know, what I'm telling you, you know, anything I tell you I can prove. So you don't even begin to challenge this. I'm telling you this. On my way to Manila, a good friend of mine said to me, Earle, normally what you should do is you should check your files to get a sense of whether all your papers are in and so forth.

It's a thing I never did. I have never argued with anyone who has written an EER on me. Never, and will never, I never debated. If you gave me that, what you wrote initially is what I am going to sign. And I'll write my comment. I'd never beg. When I was a student and a professor. I never begged for a grade. And I will never do it, and the system will never have me bend to that, you know, obsequiousness.

So, anyhow, I checked my file, and that's when I learned about this little escapade. So I went off to Manila and ended up in the revolution. And while I was in Manila, I filed a, what's the term, grievance. It was not an EEO grievance. It was just something that is horrendous for one's career. And guess what happened? The State Department agreed that I was correct. That this was inadmissible, this was incorrect. It should not be.

But, and here is where the catch is, they said that unfortunately, Mr. Scarlett, we could not determine whether, in fact, had this not occurred, you would have been eligible for promotion. That is that year that I lost in the shuffle.

Now let me address one last point with Your Honor. I know everybody here wants to go home, and you have to make a decision here. Promotions are related to assignments. They are not the only factor that contribute to promotion, but assignments do have a critical role in it. And in order to get competitive assignments, et cetera, you have to do a bit of legwork. And that is not abnormal.

You go around. You sell yourself and so forth. But that notion of the corridor reputation is very, very pervasive, and it is actually invidious. So you can have a very fine EER's, but if your corridor reputation says that this guy, you know, might raise some unorthodox questions, your chances are beginning to dwindle. These are the facts.

And as we sit here today, I'd say to Your Honor with great respect to you and the Court and to the fine people that I know in the Foreign Service, regardless of - - I was a Foreign Service examiner. I went out examining candidates for the Foreign Service. I know the criteria to look for, judgment, persuasiveness, intellectual breadth, working with others, objectivity, integrity, resourceful. I know all of these criteria. And when I look at some of the people in positions of authority and having been a Foreign Service examiner, and I see them lacking many of those qualities, and I see people out here who I know, with whom I've worked, possessing these qualities.

Sure, these qualities have to be honed. Sure, you have to mature. Sure, you develop into a better officer and so forth. You don't expect a youngster, you know, as a Class 4 officer is going to have normally the judgmental capability or resourcefulness, et cetera, because he or she doesn't have the breadth as yet. But I'm saying that there are senior officers, and I say this without reservation, there are senior

officers right now in our service, a service that I have tremendous respect for, a service that is critical for the national interests of this country who are really questionable. And I'm being - - that's a euphemism here for today in these positions, and quality of officers under this sort of stupidity and rubric of, you know, how many years in grade, if you're outstanding, you did a good job. You should be recognized regardless of your color, regardless of your ethnic origin.

You should be recognized for it, and not be denied this for some other bureaucratic humbug. There is too much of that. Let's get the best people to do the best job for the United States and take them from all segments of the United States and be representative abroad. I have no reservation about that.

THE COURT: Let me ask you. Where do you stand on the settlement? Forget about the money aspect. Where do you come off on the - - are you going to be considered - - were you denied promotions when you should have received them?

THE WITNESS: Yes, Your Honor. I gave you the case of this anomalous situation with the asterisk. I gave you that case.

THE COURT: What is going to happen to you u in the settlement?

THE WITNESS: I got a letter saying that I'll get some monetary compensation. I'm a Class 1 officer. I have opened my window I think, and my rating officers in Belgrade and in the Department in Sarajevo think I should be running my own mission. That is what they'll put on paper.

THE COURT: So in other words, you're up to go to the - -

THE WITNESS: Yes, the question is up for it and going over the threshold are two different questions.

THE COURT: When was the last time you were- - when did you become a Foreign Service - -

THE WITNESS: Three years ago.

THE COURT: Three years ago.

THE WITNESS: Belatedly.

THE COURT: So you put in now for the Foreign Service?

THE WITNESS: Yes. I'm in it right away, because I know that I'm eminently qualified to run my own mission. I know that, and others know it, too, from the very beginning as I told you when I jointed the Foreign Service.

THE COURT: You've been there what, 19 years.

THE WITNESS: Nineteen years, 11 months and a week.

THE COURT: What happens when 20 years comes?

THE WITNESS: I can opt to retire, but I'm going for the Senior Foreign Service. I put my family here for a year without me out in the bush. I was with Ron Brown the day he died in Tulosa. I've flown in more helicopters than your age, sir.

THE COURT: You don't know how old I am. But you're not going to get anything on the non-monetary aspects of this?

THE WITNESS: No, because I'm at the threshold. Those at class 1 as I understand it, and I have not studied it in detail, but those in Class 1 will not be eligible on the basis of this agreement to be promoted to Senior Foreign Service, which is strange to me, because if you've been retarded before, and you reach the stage, then they're retarding you again. They're not giving you the benefits of what should have come to you from before.

THE COURT: Have you ever filed a discrimination claim?

THE WITNESS: The only claim I've filed against the State Department is that anomalous thing and they agree that I was correct, but the remedy was there was no remedy.

THE COURT: But it had nothing to do with discrimination?

THE WITNESS: Well, I'll tell you why I think it does.

THE COURT: No, but I'm saying - -

THE WITNESS: I'll tell you.

THE COURT: No, I'm saying, but you did not use that as the reason for it.

THE WITNESS: No. I said this was abnormal, and, therefore, but I'll tell you why I think it was. Listen to this, Your Honor, bear with me a moment. When I was on the Somalia Desk, a journalist from the Washington Post came to the Department and he wanted to interview three Foreign Service Officers who were desk officers. And someone in the system recommended that he speak to me. I was handling Somalia.

My distinguished colleague, Bruce Thomas who spoke earlier on, we served together in Manila. And I know what he told you about, because I lived with him in Manila. Right? And he was also Somalia Desk officer. We sort of have similar careers in that sense. And I served with Odie Fields, by the way, when Odie was in Brasilia.

So the journalist came, and he said he would like to interview me. I said, well, how did you get my name. He said, I got your name from the head of AFSA, who happened to be a classmate of mine in the Foreign Service, who by the way is an FEOC, dear friend of mine, a very capable officer, white male and excellent, fine gentleman.

So he said, speak to Earle about this. So I was one of the three Foreign Service Officers interview. I cleared this, by the way, with Public Affairs in the African Bureau and with my boss, you know. So the gentleman came and he sat in this little room with me, and he said, well, first of all, he was a little taken aback which he confessed to me that I at the time, and this is 1982, that I was a desk officer.

I explained what a desk officer does and so forth, and he said, you know, I've interviewed two other people about this, but I find your commentary is very interesting. He said,

do you mind if I ask you a question that's not directly related to being a desk officer? Why not? He said, what is your opinion of the situation of minorities in the Foreign Service? And I'm talking about 1982 this occurred.

I said, let me tell you something, young man. I am not an authority on this subject. Now I am, by the way, but then I wasn't from experience and study. I said, I'm not an authority on this subject, but I'll tell you one thing. Secretary Cyrus Vance made some efforts here in this field, very, very concrete, specific, purposeful, directed efforts, and in my estimation, this has been discontinued, at least the fervor is not there. Right?

I said, but I'm not an authority on this matter. I recommend - - he says, can you recommend someone that I might speak to about the matter? I said, but, of course, why not? I recommended him to a number of people I knew in the Department who were more attuned and more informed about this matter.

The next day or two, he published an article in the Washington Post. The headline said, Black American Officer Criticizes Department For Racism. Black American Officers it said. I got a call from Lagos, Nigeria. My wife was in Lagos on an official visit and she picked it up in the wireless file. She said, you're going to lose your job. My father-in-law called me from Baltimore. I started getting calls. I had not read the article.

My boss at the time who had never - - not my immediate boss, but my boss above that, who had never set foot - - he's a prominent U.S. diplomat, by the way, had never set foot in my office before, came into my office, closed the door, had this newspaper in his hand, right? He says, have you read this article? I said, no, I'm too busy. I haven't had a chance to read the Federal page or whatever page it was.

He gave it to me, and said with my name, Earle Scarlette, and to make it unequivocally clear, since you wonder where my accent is from, he says Jamaican born. So there was no question or confusion as to who this person was.

THE COURT: I thought you got that in New York, that accent.

THE WITNESS: Yes, in Brooklyn.

THE COURT: Brooklyn.

THE WITNESS: So he had this article, and I read it. The article said exactly what I said. That Cyrus Vance had made some significant steps in a positive direction with regard to making the United Sates Foreign Service more representative of the United States itself and so forth. He said, did this journalist misquote you, he said? I looked him dead in his eyes, and he's a prominent American ambassador today, and you all know him, and I won't tell you his name, but I looked him dead in the eyes, and I said, he quoted me verbatim. And I take nothing back from what I said.

A friend of mine was a recent ambassador, one of the few black ambassadors, called me that day. He was not an ambassador then. He's been an ambassador recently. He call ed me, and said, Earle, you're going to lose 10 years in your Foreign Service career about that. Your question to me, Your Honor, as to whether this little chicanery performance by my supervisor with the asterisk was related to race, it was. Because it was one month later he wrote that.

THE COURT: The same person that came into your --

THE WITNESS: This person reported to that person. And from then on there has been this tendency to truncate my career. But they cannot do it, because I'm too good. And I'm telling you this. But there are better people out here,

BEST AVAILABLE COPY

better. Beverly knows it. There are better people out there. And, Your Honor, equity, justice and all the things this great country is founded on, these things should be respected in this Court.

I am not going to get in a debate as to how much money who should get or whatever. But what some of my earlier speakers said about fairness, fairness should prevail. Not, you know, obfuscation, waffling and vacillation.

THE COURT: But that's what you're doing, though, when you say you're neutral.

THE WITNESS: No, you're not a diplomat. You're a judge.

THE COURT: I've always been blunt.

THE WITNESS: No, but, frankly, Your Honor, I've just come back really and I'm going to study it, but the two reservation I had are just a reasonable reservation as to why I should ponder this a bit more.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: I promised Mr. Thomas, and I've got to go on. Listen, you have been absolutely terrific. I appreciate it. You've been very helpful. I'd wish you'd give me some advice, but that's all right. You won't do that. Because you're the diplomat. Thank you very much.

(Witness excused.)

THE COURT: Go ahead, Mr. Thomas. Let's go. I'm sorry that your fellow officer there was so articulate that I had to let him go.

MR. THOMAS: He's a hard act to follow.

WALTER THOMAS, SWORN

THE COURT: See, if I had gone down to Jamaica and gotten that accent, I'd probably be in a better position than I'm in now. Go ahead.

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Would you state your name for the record please.

A. Yes, I'm Walter Thomas. I reside at 1400 South Joyce Street in Arlington, Virginia.

Q. And Mr. Thomas, during he processing of this particular civil action which led up to this consent decree, did you have occasion to meet with Mr. Kerry Kirkland concerning the prospective relief in this decree?

A. Yes, I have. I have done that.

Q. And during the time period, did there come a time in August, 1995, when you attended a meeting at which Mr. Kirkland and other members of the plaintiffs' counsel were present and were plaintiffs present?

A. Yes, I believe the date was August 8, on the 8th of August, 1995.

MS. HUTCHINSON: Your Honor, I'd like to have this letter marked for identification. I'm sorry we don't have lots of copies.

THE COURT: I've got an appointment I've got to cancel.

(Pause.)

THE COURT: Mark that as what, a Court exhibit?

MS. HUTCHINSON: This is actually a plaintiff class, so it would just be - -

THE DEPUTY CLERK: Plaintiff Thomas 1

(Plaintiff Thomas' Exhibit No. 1 marked for identification.)

THE COURT: You're going into night court now. You know that.

THE WITNESS: Your Honor, I think that was the last question, or did you have - -

BY MS. HUTCHINSON

Q. I want you to identify this particular letter and then we have one more question as soon as these gentlemen take a look at it.

THE COURT: What is this? Just fill me what this letter is about.

MS. HUTCHINSON: This letter is just to show that they did have this scheduled meeting, an it was August 8, 195, and sot of, you know, gives us a foundation for what his next question - -

THE COURT: All right. Go ahead. And did you put that as Exhibit - -

THE DEPUTY CLERK: Plaintiff Thomas' 1, Your Honor.

THE COURT: Okay. Go ahead.

THE WITNESS: Did someone have a question for me?

THE COURT: She's going to have it in a second.

MS. HUTCHINSON: As soon as I - -

THE WITNESS: Oh, I'm sorry.

THE COURT: Why don't you start asking. He can read it. Oh, you're going to have to show it to - -

MS. HUTCHINSON: Yes, I'm going to have to show it to him. But I can ask him.

BY MS. HUTCHINSON:

Q. At this meeting that you attended in August of 1995, did you discuss at that meeting the actual prospective relief in terms of the Council for Diversity and EEO awareness and the monitoring of the consent decree?

A. Yes, we did. We discussed the full range of the consent decree that we had rejected, and we submitted both written and oral comments and stated fully what we opposed, what our objections were, ranging from EEO to the dispersement calculation of damages. I mean, we spent a number of hours there, and we covered I would call the waterfront.

Q. Now, I want to show you what's been marked for identification as Plaintiff's Exhibit Thomas 1 and ask you to identify it please.

A. Well, actually, this is a letter that I wrote to Judge Sporkin with a copy to Carl Anderson and to John Birch, and it was to indicate to the Judge that we were not in agreement with many of the things which were being put forth under the heading of acceptances by the plaintiffs and the Legal Action Committee. So that's what that was about.

Q. Now, what date is that letter that's Plaintiff's Exhibit Thomas 1?

A. This is dated September 25, 1995.

Q. And would you go to the third page of that document please?

A. The third page?

Q. Yes, the third page.

A. Okay, I'm here at the third page.

Q. And on the third page, it's that - - what's the date of that particular document that is the third page?

A. It's dated August 5, 1995.

Q. And in that particular document that's dated August 5, is there a reference in the first paragraph to a number of written comments that you were going to present at that meeting of August 8?

A. Yes. It says attached are the addendum comments, which cover the extra pages in the document forwarded to us on July 25, 1995.

Q. And at the meeting on August 8, were those comments present and was Mr. Kirkland present at the meeting of August 8?

A. Yes. We passed them out, and we discussed them.

Q. Okay. And was there any identification by you as plaintiffs at that meeting on August 8 as to whether or not you were satisfied with the EEO diversity program and all the monitoring aspects of the decree?

A. Well, it was at that time that we said that there were certain aspects which the State Department had accepted and that we said probably could be put in, but that there had to be quite a bit more work being done with regard to the GAO reports and the deficiencies and to verify whether or not, in fact, the State Department had complied with certain deficiencies in the audit done by the GAO.

And there were just a number of things. And, of course, there was a memorandum also forwarded in addition to this saying that more work had to be done in the area of EEO.

Q. Now, in terms of Mr. Kirkland's role at that meeting, was he under the impression that your concerns were minor concerns.

A. Oh, no, I don't think so - - no. They weren't taken as minor concerns. These were concerns which we had not verified to have been satisfied or that we were not satisfied with and we stated emphatically at the meeting that there were many areas which could not be accepted under the present condition. And as a matter of fact, we stated that the - -

Q. Okay. That's fine. Let me ask you this.

At the meeting of August 8, 1995, did there ever come a time when you informed Mr. Kirkland that you were satisfied as plaintiffs with the total EEO monitoring and prospective relief that had been designed?

A. No, we did not say that we - -

Q. Thank you.

A. No, we did not.

MS. HUTCHINSON: That's all that I have.

THE COURT: Well, what would you like to tell me? You waited all day. Let me just ask you a question or two. I think I want to put something in perspective.

How many objectors do we have to his, 57?

THE WITNESS: Objectors to the consent decree?

THE COURT: Yes.

THE WITNESS: Your Honor, I believe there are something like 56 or 58, if I'm not mistaken, but it's something to that almost 60.

THE COURT: And so that's - - what percentage is that, almost 15 percent of the total?

THE WITNESS: If you add the other 18 of us who oppose it, the you'd have maybe 60 with another 18.

THE COURT: So we're talking about 25 percent, right?

THE WITNESS: Yes, Your Honor, I believe in that area.

MR. SELLERS: Your Honor, I believe the 58 include the 18.

THE COURT: Do they include the 18?

MR. SELLERS: I believe so.

THE WITNESS: Well, I believe that they were separated, Your Honor. We already had those of us who already opposed it and then it was sent cut for moment, and those are the comments that came back. But at any rate, it was opposed.

THE COURT: And can you give me succinctly your position here?

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead.

THE WITNESS: Your Honor, we have listened to a very eloquent group, and there's been a central theme from even those who have accepted this consent decree to say that in some instances they're doing it because they want to move on. Some instances they say they want to give the State Department a chance to show that it's not going to continue what they perceive to b a pattern and practice of racist activity.

And as you know, Your Honor, I have said from the very beginning that there was no way that this consent decree was going to be accepted by us unless it contained equity and we understood fully that along with each settlement there has to be give and take on both sides, Your Honor.

But the fact still remains that a consent decree that does not address the issues of the lawsuit that I brought and which, in fact, does little to change that which has been established and is still maintained so that whites can maintain a privileged class and work status at the State Department, it will not be accepted.

So my position is the same as the first day that I came to you, and you asked - - maybe it wasn't the first day. Maybe it was in January, and you asked, didn't I want to do it in a democratic way and didn't I want to work and reach a situation and position where we might resolve this. And without going into whether or not one has or has not integrity, Your Honor, let me just say this. And this is sort of a rhetorical kind of question to the Court.

If the Court, if you hired lawyers to carry out a mission that you considered extremely serious and that it affected you for all of your life, and they said to you that you couldn't be a part of that process, and, in fact, in instances made it quite clear that you were not a part of that process, and in that process within the time that you had given them to move and do the tings that you had asked them to do, those things weren't done.

And if you come back to the basis of what I'm saying, Your Honor, is as I said to you, no deal is better than a bad deal. And this is a bad deal. And now we've gone through everything that the Court asked us to do. You asked to have the democratic process take place and we did that. And we've tried to become a part of this process, and we've been walled out of it.

And it happened without lawyers. Now, I'm not going to go into the integrity part, Your Honor. I understand your feeling on the integrity, but we have to make that decision about integrity and what's being done for us. Because after all, they are not going this to the Court. They're doing this to us. And centrally throughout every single theme that has been presented to this Court has run,

even for those who've accepted it, some have said they've accepted it out of bare necessity. Some have said it was accepted because they want to move on with their lives.

But consistently, no one has come here to say to this Court that there is not blatant systemic racism that is being carried out by people who have a temperature of 98.6. It's not the tables over there doing it. It's not the water fountains. It's nothing but actual bodies obstructing us and discriminating against us to maintain a privileged situation, which, in fact, the children of some of our attorneys if they're graduating from schools this year to come into the State Department would reap the benefits of.

And yet they come to us and tell us that they did the best they could, but we couldn't hear them. We couldn't come into the room. Well, I'll move on, Your Honor.

THE COURT: Well, I want to ask you some questions which you got to help me on. Give me a little bit about yourself.

THE WITNESS: Your Honor, I don't think that anybody could know this case any better than I did because I filed it.

THE COURT: No, I want to know about your - -

THE WITNESS: I will tell you, indeed.

THE COURT: When did you come into the service?

THE WITNESS: I entered the State Department actually in 1977 after being rehired because I have prevailed in a situation of reprisal.

THE COURT: You're confusing me. When did you first come to the State Department?

THE WITNESS: I came to the State Department in 1975.

THE COURT: So you first came in '75. What was - - before that time, what was your education?

THE WITNESS: Oh, okay, Your Honor. Let me start. I went to Boston & Latin English High School in Boston, Massachusetts. I went to Newman Prep, Boston University, Howard University, and the Institute of Linguistics at Georgetown.

THE COURT: What did you get from Howard University?

THE WITNESS: I got my undergraduate degree, Your Honor. Went to graduate school and - -

THE COURT: Masters degree from - -

THE WITNESS: I was getting my Masters degree and lacked the thesis form because I got accepted into the Foreign Service and chose to do that while I was still active.

THE COURT: So in 1975 you came to the State Department?

THE WITNESS: Yes. But prior to that I'd been a deputy country director to Venezuela in the Peace Corps, Your Honor.

THE COURT: So you were in the Peace Corps. How many years in the Peace Corp?

THE WITNESS: I was there three years, Your Honor.

THE COURT: Three years. Then you went to the State Department.

THE WITNESS: Went to the State Department from the Peace Corps, Your Honor.

THE COURT: In '75, and then something happened between '75 and '77?

THE WITNESS: Oh, a lot happened, Your Honor.

THE COURT: What happened between those two years?

THE WITNESS: When I went to the State Department, I took the exam which was for the mid-level program, found qualified and was asked to take the physical which I had always taken at the State Department. Peace Corps comes under Foreign Service and we'd done that.

I was waiting to be called, and they did what they call a security update, Your Honor. And when doing this security update, they visited the State Department and found that I have prevailed in a prior protected class action under Title VII. an action which protected me from racial discrimination.

THE COURT: At what institution?

THE WITNESS: The Peace Corps.

THE COURT: At the Peace Corps?

THE WITNESS: Yes, Your Honor.

THE COURT: You had a discrimination case at the Peace Corps?

THE WITNESS: Which I prevailed on, yes.

THE COURT: So what did the State Department do to you?

THE WITNESS: Well, the Security Division went down to the Court to see what we had filed, and then after doing that, they went back to the Peace Corps, and I started getting calls from people saying, hey, there are people around here asking questions about you. And I said, that's no problem because the case is over. I'm over at the State Department now, and I'm ready to move on, I thought.

Well, it didn't happen that way, Your Honor. The Security Division, in conjecture with the Medical Division sought to disqualify me as not being qualified to enter the Foreign Service, and did, in fact, ask me to return to take a second physical which was different from the first physical I took to enter. And the second physical, they thought that I should take a psychiatric exam.

I did take the psychiatric exam, Your Honor, and was still found to be unfit for Foreign Service work, after previously passing the exam. I thought that was quite strange, Your Honor, in view of the fact that it was only two months between my first passing of the exam and my second passing and so I asked that I have a review of my physical,

and I was quite anxious to se the psychiatrist's report, because I had never had to take a psychiatric exam at the State Department before.

THE COURT: I'm glad I don't have to take one.

THE WITNESS: Well, at this point, I'm second in line for that, Your Honor, I'm happy also. But let me say, Your Honor, that - - and I'm going to cut through a lot of the - - because of time.

THE COURT: So you got it overturned and you got on the State Department.

THE WITNESS: It was overturned, but it was a unique kind of thing, Your Honor, because it was found that the State Department was willing to go to the extent of juxtaposing my medical records in order to keep me out of the Foreign Service, and it was found that, in fact, under the, what it is, CFR, Code of Federal Regulations, that I had been the victim of reprisal, and they promised that they weren't going to do that any more.

THE COURT: So you got on at the State Department.

THE WITNESS: Got on with the State Department.

THE COURT: In '77, and you were there for how long?

THE WITNESS: Went to Rio de Janeiro, Your Honor, and you've heard about corridor reputation, so, of course, when you catch the State Department with their trousers down, you really do have a reputation.

So I went to Rio. My reputation followed me. I had to file a charge of reprisal there, because of my efficiency reports being falsified, and they were partially removed from my files, and a letter inserted that the efficiency reports were false and inaccurate and falsely prejudicial to my career.

I then, Your Honor, tired to get assigned after Rio. I couldn't get an assignment. I was told that there weren't any bureaus that wanted me. I involved the Office of Equal Employment Opportunity to assist me with getting

assignments. They were unable to do so until such time, Your Honor, that I got my own assignment to Ghana. I went and looked myself.

THE COURT: I thought you were going to set up your own country, get your own assignment.

THE WITNESS: Well, and almost did, Your Honor. But upon arriving in Ghana, I found that my reputation had preceded me, and the only thing that I was able to get out of Ghana were satisfactory evaluations and falsified evaluations, Your Honor.

After leaving Ghana, I returned to the United States with no assignment after submitting some 75 bids for jobs. Got to Washington and was told that again no bureau, by my career development officer, that there weren't' any bureaus that wanted me. And I said, what's the reason? And, so, of course, when he mentioned what I did, I had a few words in response to that, and said that I would be assigned.

And I worked with the Office of EEO there to get an assignment and could not get an assignment, Your Honor, except for one place which was in Antigua or our U.S. Embassy in Barbados, but we had a regional embassy in Antigua. I was assigned to Antigua, but was abruptly notified that I was not welcome in Antigua.

The ambassador from Barbados called me from Barbados and said that before I should come to Barbados for onward assignment that he felt that there was a tremendous need for him to take a trip and come to Washington because he had heard of me. And I welcomed his invitation, Your Honor, and told him, that, of course, I would be in Washington waiting when he came.

And he did come. He came and told me that he had heard about me, and that basically I was not, because of my reputation in the Department, welcome in Barbados, but that he was willing to give me a chance, although he had heard that I was quite intelligent but lazy. And I told him that I though that was quite interesting, and that I felt that if he had

any reservation about my coming to his area or to his post, that he should contact the people in assignments and if they were willing to break the assignment, I would be willing to seek another post.

I informed the Office of EEO/CR at the State Department. They interceded to a point, Your Honor, but the assignment was not broken, but I did duly inform the ambassador that I was coming to his post, but I was not coming afraid. Now, I later learned, Your Honor, that meetings were held prior to my arrival in Barbados in which it was stated and there was an investigation by the way that caused this lawsuit to be filed, Your Honor, but that I was told directly by the ambassador that I would have to cease my EEO activities.

And I asked him, you mean, not use the method that the Constitution and the Congress provided for me to keep bread in my mouth? And his answer was, you will either have to ship up or ship out of my area. And that's when I told him that I thought that since I wasn't coming afraid, because I grew up in Roxborough, Your Honor, that the only thing that frightens you is a .357 magnum.

So that didn't frighten me. And I went to his post and found out later through an investigation that was done after I had to raise the charge of reprisal which was supported, by the way, Your Honor, by an independent assessment that, indeed, after I arrived at post that reprisal was taken against me and my efficiency reports were, in fact, not accurate, and Your Honor, you've heard everybody here eloquently speak and say to you that your assignments and your efficiency reports are your vehicles to success in the State Department.

Well, at any rate, I filed a charge, Your Honor. The charge was upheld, and I attempted a settlement with the State Department, after that was unsuccessful. And I realized as I had realized all of those previous years, Your Honor, that there is a lot of suffering and there is a lot of

heartbreak and there are a lot of people destroyed, devastated and ground up at the State Department by the wishes of a chosen few.

But I asked those people, I asked six of them, if, in fact, I take this stand, which I'm going to do anyway, do you stand ready to go forward with me. And they said, yes, Your Honor. I had already filed a complaint, a class complaint, and told them that I had others who were going to stand with me. Would they do it? They decided to do so, Your Honor, and I filed the complaint.

The complaint was investigated, Your Honor. My, by the way, complaint of reprisal was upheld, and it was adjudged that I had reprisal taken against me, Your Honor, but he State Department felt that I was asking too much compensation for that. And I pointed out to them that I didn't think it was too much after a pre-employment and post employment pattern and practice of discrimination, which I prevailed on.

So, Your Honor, we came to the point that we had to make a decision. And this is whether or not we would settle this case with Walter J. Thomas or whether I would file on my behalf and on behalf of similarly situated officers. I didn't file this case, Your Honor, to receive no remedy. And I don't think anybody expected that. At least I didn't think so until I was told by attorneys that, in fact, I shouldn't have filed this as a class action if I expected any remedy for my individual claim. Now, these were my own attorneys telling me that. And, Your Honor, that went over with me like a lead balloon.

There is no one that I know of who files a lawsuit, especially in the pattern or the way that I did and would not expect that their individual case be given proper review. And that is basically where our conflict began, but it is not where it ended.

THE COURT: Let me get this now. When did you file this lawsuit, 1988?

THE WITNESS: This particular - - this one? The one we're talking about right now, Your Honor?

THE COURT: '86?

THE WITNESS: No, I filed in 1984, Your Honor.

THE COURT: '84.

THE WITNESS: Filed a complaint, and we had to go through, of course, the administrative process, Your Honor, in the State Department.

THE COURT: When were you terminated from the State Department?

THE WITNESS: I was terminated almost simultaneously with this particular issue. I was terminated in January of 1985, Your Honor.

THE COURT: After how many years was that? Ten years?

THE WITNESS: Yes, Your Honor, after approximately 10 years and some months.

THE COURT: And what basis were you terminated?

THE WITNESS: Well, Your Honor, three months after I received tenure, I was terminated for reasons of not meeting the standards of my class or my fellow - - I didn't have a class because I came in as a mid-level officer, but not meeting the standards of my colleagues who were at my grade and level. But that's now three months after I passed the examination for tenure.

THE COURT: And do I understand what you did, you filed and EEO complaint?

THE WITNESS: I did, Your Honor.

THE COURT: And you got what, a letter of a right to sue?

THE WITNESS: Yes, Your Honor. What happened was, I filed for summary judgment before Judge Revercomb, and at first he found in my favor and then upon reconsideration on the summary judgment request, he said, no, and said that I should have a trial. Well, there was no need to have a trial twice. I knew I was going to have a trial

on the EEO issues, Your Honor, so I chose to pursue that and waived the right to go to the EEOC which was going to tell me nothing more than I could come to Court and we filed in District Court, Your Honor.

THE COURT: Now, with respect to the settlement, can you quickly, because it's getting very late, and we can't keep my people here. I'll stay, but we got reporters and - -

THE WITNESS: I'll move rapidly.

THE COURT: Tell me what it is that - - which do you want to take? Do you want to take for all people or for yourself? I want to get both aspects of this down. In other words, what you feel needs to be done for all the people.

THE WITNESS: Your Honor, when I filed this lawsuit, I filed on behalf of those people who were similarly situated, and I wasn't trying to block anybody who had been reached for promotion, who were under consideration for promotion. I filed for those people who were not being considered for promotion, who were similarly situated, who were having reprisal taken against them.

THE COURT: What are your recommendations to improve the settlement with respect to the class?

THE WITNESS: Your Honor, there are many aspects, but let me capsulate and say to you that this consent decree in reference to the class must go, if it goes at all, it must represent the areas of the lawsuit that have not been addressed, reprisal, selection out, promotion and assignment for those who have been damaged, Your Honor. And for those plaintiffs who stand before this Court with a claim and to have their individual claim subsumed in a general class way is not going to make it. So that's what I'm saying.

THE COURT: So you want to abandon the class action?

THE WITNESS: No, Your Honor. I'm saying that I'm not trying to preclude anybody in the class from receiving any benefits that the State Department sees fit to give them. I'm not trying to do that. And I think that, in fact,

Your Honor, it would be good if this could be resolved as a class settlement. But it can't be resolved as a class settlement by waiving and subsuming the individual rights of those of us who have left our claims in abeyance either for adjudication upon settlement of this case or through litigation.

THE COURT: Well, what you're really doing is you're really affirming what Judge Revercomb did by saying that this shouldn't be a class action. Everybody that has a grievance should come forward and prove their grievance.

THE WITNESS: Well, Your Honor, you know when we went before Judge Rivercomb, I heard that mentioned before, and we had absolutely no discovery to show Judge Rivercomb at that time anything.

THE COURT: Well, why should this be a class action if you're saying to me that everybody should get what they're entitled to and to be able to go out and prove their own case? That's the antithesis of a class action.

THE WITNESS: No, what I'm saying is, Your Honor, and I want to be very careful and state this because I've tried to state this before. There are some of us who are plaintiffs how have individual claims. I never heard of anybody saying that because you file to get relief for yourself and if you say for others who are similarly situated that you would waive every right you have to your individual case that's pending. The case was filed, it was filed originally for individual and class relief.

THE COURT: Why do you think the State Department would settle a case like that?

THE WITNESS: Let me tell you why?

THE COURT: Excuse me. The reason they want to settle a class action is they want to resolve everything. They don't want to have to sit back here and deal with 357 separate claims.

THE WITNESS: Well, then they should make it equitable.

MS. HUTCHINSON: Can I speak to that, because there are consent decrees, and I've written them. I used to be a pattern and practice attorney for years, see, and I've written them, and they contain individual hearings for relief just dependent on what the parties think they can do with it. They don't necessarily have to just give blanket block relief to people if that is determined not to be the best agreement that individuals can be reached.

I understand what's been reached in this case, and he's saying that in his opinion, you asked him his opinion, that his opinion is that that is not appropriate.

THE COURT: I understand what you're saying. The point is the government is saying they're not going to do that.

MS. HUTCHINSON: Well, we're not saying you're to make the government do that. He's saying that he's dissatisfied and he thinks that should have been done. He recommended to his lawyers that that be done.

THE WITNESS: And they didn't do it.

THE COURT: I know, but it's not up to the lawyers to -- well, okay. Go ahead. Look, we're getting late now.

THE WITNESS: Okay. Let me just finalize this by saying this, Your Honor. You know, it would have been very easy for me and the named plaintiffs to have turned this case over to our lawyers and said let us know in eight years what you've done with the case. We didn't do that, and we're not going to do it. And the point is, the very difficult point is that they didn't get the picture, Your Honor.

The picture is you cannot dismiss the principals, go out, settle a lawsuit the way you want it settled as a lawyer and come back and say, here is the best I could do for you, and you weren't even involved. We have written. We have talked. We have implored. We have done every single thing we could do, and we even -- and you asked me this, and I said to you, Your Honor, standing right there at the lectern in front of you, you asked me didn't I want to handle it the

democratic way, and I said to you, yes, Your Honor, I do. And you said, well, then the way to do it is let's send this out to the people and see what they have to say about it.

Your Honor, we sent -- you allowed it to be sent out. Whether 10, 15 or 20 responded, they responded and they responded just as though there was a 5 to 4 vote on the Supreme Court and the dissenters don't get to write the law. It's come back already, and it came back and it wasn't accepted.

THE COURT: There were a lot of people that didn't vote out there.

THE WITNESS: Well, Your Honor, I mean, there are a lot of people who don't vote for the President. But I mean, you can't -- I'm not trying to be persnickety, but I'm trying to say, Your Honor, that because they didn't vote, we did what you asked. You said, and not that we had a choice, but we went along. We didn't jump up and down and say that.

THE COURT: Let me say, I want to hear the lawyers, because we're getting 6:30.

THE WITNESS: Your Honor, thank you for --

THE COURT: Thank you.

THE WITNESS: I hope that this will be the last time that you hear from me, but I'm not going to promise that, Your Honor, and I'll be right back here to say to you the same thing as I said before that no deal is better than a bad deal, and they can protest and tell us what they won't do, but, Your Honor, I can say in parting to you, I walked over to Union Station this morning, and I walked up near the American Café, and I saw a fountain, a water fountain which at ten years old I couldn't drink out of, and when my mother and I and my family would come through Washington heading to see my grandmother, we couldn't get water at that water fountain.

It wasn't because there wasn't any water there. It was because somebody said we can't do any better for you. You can't drink out of this water fountain. Today, just out of curiosity, I said, hum, I looked up, same water fountain. They haven't renovated that section. They left it. And I turned the fountain. No water comes out of there, Your Honor.

Now, when I was 10 years old, water did come out, but I couldn't drink it because somebody said that's the best I can do for you, and that best isn't good enough. It wasn't good enough then and it's not good enough for us now. The vote has been taken, and so be it. Thank you.

THE COURT: Now, if you had the water come out, you couldn't drink it either. You still can't drink the water here. Thank you.

(Witness excused.)

THE COURT: Now, you know I promised Dr. Bruce, and Mr. Barry and Ambassador Burroughs, is there anything you'd like to say? I don't know when we can -- all right, Ambassador. What would you like to say? I don't know when we can continue this. I don't think I gave you all enough time.

THE DEPUTY CLERK: Would you put your name on the record please, sir.

MR. BURROUGHS: John A. Burroughs.

THE COURT: You've been very patient.

MR. BURROUGHS: I guess basically the only thing we wanted to say, obviously we've looked at a number of cases and a number of applications, and I think from a personal standpoint, a professional standpoint, I tend to agree with much that has been said here today. Having worked for four years in the Office of Equal Employment Opportunity, I know and can identify with those problems that have been mentioned here today.

And as I pointed out last time when I was here, Your Honor, that many of the problems that have been identified today are long standing problems. I think Mr. Fields --

THE COURT: It's a cultural problem.

MR. BURROUGHS: Whatever you want to call it, Mr. Fields, for example, mentioned a study by Clark and Phipps. That study was done in the '60's. I was -- paid Kenneth Clark, the noted black psychologist to deal with the same kinds of problems that we're talking about today here, you know, with the State Department.

With respect to the specific case at hand, I think collectively all of the panel members agree that it's unconscionable to expect that those reinstatements, those four reinstatements that we've identified, to expect those people to literally start all over again for a couple of reasons.

First of all, they will be identified the moment they walk through the door as reinstates if you will. Furthermore, they're a lot older now than they were when they left the service. We feel that it's unreasonable to expect --

THE COURT: Well, what would you say then? You heard the way Mr. Birch said that has to be done. How would you do it? Just say they get tenure immediately?

MR. BURROUGHS: Bear in mind now, we understand that 95 percent of Foreign Service Officers receive tenure. It's only about five percent apparently that don't. Maybe they can correct me if I'm wrong. Looking at these applications that we've looked at, these people have been recommended for tenure not once, not twice, but constantly in their EER's.

THE COURT: What happened?

MR. BURROUGHS: They weren't tenured.

THE COURT: Well, how do you get recommended and you don't get tenure? The board doesn't approve it?

MR. BURROUGHS: No, no. Their supervisors recommended them for tenure.

THE COURT: I see.

MR. BURROUGHS: You know, put it in their efficiency reports.

THE COURT: Well, how does it work if someone – if you reinstate someone who is a 1, FSO-1, reinstate them. They get reinstated to 1, but what would you do? Reinstate them to the Foreign Service? What would you do?

MR. BURROUGHS: No, no, what I'm saying is that the commissioning and tenure board, I think at least one of them were recommended for tenure. What I'm saying is that they've been recommended by their supervisors. They should be tenured and then go from there. Not have to serve the possible five years and go through the same process all over.

THE COURT: I see.

MR. BURROUGHS: In fact, I even think some of them may run up against the mandatory retirement.

THE COURT: In other words, if someone was a FSO-1 and you said reinstate.

MR. BURROUGHS: Yes.

THE COURT: And you reinstate as an FSO-1; isn't that going to happen? Don't they automatically get tenure?

MR. BURROUGHS: No.

THE COURT: What would happen?

MR. BURROUGHS: They have to be tenured again.

THE COURT: Again?

MR. BURROUGHS: Yes, by some board.

THE COURT: Okay, I got you. What else would you like to say?

MR. BURROUGHS: The only other thing - -

THE COURT: I think you made that point.

MR. BURROUGHS: Okay. The only other thing is the fact that as was brought out I think there needs to be, you know, more monitoring by the Court. I think you have four years in which to, you know, sort of look at this case. There

is a lot of statistical gathering, but that has to be monitored and there has to be a commitment on the part of the Department, serious commitment.

THE COURT: Okay. Anything else?

MR. BURROUGHS: That's it, Your Honor.

THE COURT: Folks, what do you want to do? I want to hear same more from you people. When can I hear it? I can't do it tonight. It's so late. You got an old man here.

MR. BIRCH: I'm going to turn 51 pretty soon, so I'm there, too.

THE COURT: You're not near me, but that's all right. I'm almost - - hearing all these people tenured, I'm ready to go become retired, what do you mean tenured? I'm beginning to say, boy, that would be a good thing. Go ahead.

MR. BIRCH: Let me free float, Your Honor, for the purposes of scheduling if I may get the other counsel up here and we can kind of make some suggestions to you. You had said this morning that you wanted the notice to go out to the 21 people with the 60 day turnaround time, and I will draft something up and fax it to the other counsel.

THE COURT: I think I want to talk some more with you. Can I do that? I don't think it's fair after hearing all these people today that we just don't get back and say, let's see where we are. I'm not ready to prepare after I don't know how many hours we've had of hearings to make up my mind at this late hour.

MR. SELLERS: When should we schedule a time to return?

THE COURT: I don't think we need everybody here. Can we get a date?

THE DEPUTY CLERK: If your jury is deliberating, July 25 at 10:30.

THE COURT: What date is that? Thursday? I can't do it earlier than that? I mean an earlier day?

MS. HUTCHINSON: How about the 23rd?

MR. SELLERS: I can't do it the 23rd.

THE COURT: I'm liable to still be in trial, but we can try it.

THE DEPUTY CLERK: You have a criminal motion that morning, Judge.

THE COURT: Well, let's do it about 4:00 o'clock then.

MR. BIRCH: What date is that, Your Honor?

THE DEPUTY CLERK: You have criminal motions late in the day also.

THE COURT: When do you think I can do it?

MR. SELLERS: How about the 22nd or the 24th?

MR. BIRCH: I'm prepared to either come early or come late, Your Honor.

THE DEPUTY CLERK: The 22nd at 5:00 o'clock.

MR. SELLERS: That's fine.

THE DEPUTY CLERK: Or 4:30.

THE COURT: 22nd at 4:30. Now, here's what I'd like you to bring. Bring the language that you just talked about. Get me that language and what I want you all to do is to think about what took place here today.

Now, let me tell you what is troubling me, and I ought to tell you so I want you to address it, that here we have - - we're not now talking about a small number of people. We're not talking about a few people here that are, you know, might have an axe to grind. What you're talking about is a group of over 10 percent of a work force, of the minority work force and they're telling you something, and are telling you that this has been long standing, and that there are some problems here.

I mean, you take - - is that Ambassador Burt not Ambassador - - what was that fellow was that - -

MS. HUTCHINSON: Scarlett.

THE COURT: I mean, there's a fellow who wasn't taking any position, has never filed an EEO complaint. He's as articulate as you'll find anybody and was telling you that there are some real problems it the system here. I think you got to look at that.

Look, there is no sense in us going through this whole business here and not coming up with a fix that's really going to fix it. Now you got a cultural problem in seems to me that is very, very - - I don't know you deal with cultural problems. Because it's clear from what everybody has testified here today or said that there are a number of Secretaries that really wanted to come to grips, good Secretaries, people that you and I know are good people, just as Secretary Christopher I'm sure wants to deal with this problem.

But you had Dean Rusk who was a fine and able gentleman. You had Vance, and every time they try to deal with it, it seems to me they weren't able to deal with it. So that shows some problems. I don't know the answer to this thing. I honestly don't. But you're getting some very - - even the people that are for it are people who were not willing to say there wasn't this discrimination. There is nobody here that said there wasn't discrimination here and that it was in somebody's mind.

I think your Ambassador Burroughs is a fellow that you - - and Bruce and - - Dr. Bruce and Mr. Barry are people you want to talk to. I think everybody wants to clean this up. And so let's see what we can - - let's talk about where we were and what has to be done. Maybe the opting out will do it. But if it's going to spawn 30 or 40 lawsuits, I don't know if that's a good solution.

I think you ought to go back to the State Department and tell them what happened today, and get a copy of the - - ask the reporter here to get a copy of his testimony and the fellow from Las Vegas' testimony. It wasn't Las Vegas. It

was Reno. Why do I get Reno and Las Vegas - - his second statement that he made I thought was very articulate.

Who was the other fellow back there? There was another fellow that's got some tenure problems coming up in a couple of months and he's going to be thrown out of a job. The fellow back there sitting next to Bruce. He's not back there any more.

Maybe you ought to get the transcript that was here today, and I think somebody ought to just talk to the Secretary if you can get to him. He's busy, I know that. And what I would tell him is, say, look, we ought to try to fix this thing and fix it good. I don't know if you can. It's a tough one. I don't know how you can fix it. If it's what I think it is, it's a cultural problem. I've never seen any place where it's such a cultural problem. You just had the problem with he women there. Didn't you just straighten that out? Was that you or somebody else?

MR. BIRCH: That was me. We settled the Palmer case.

THE COURT: Well, I guess they have it over at the CIA with the women, too. I don't know. Well, that was cultural, too.

You know, you got another problem. Nobody has even dealt with this one. Sometimes the host country tells you to discriminate. We haven't even talked about that. Am I right? The host country will say that - -

MS. HUTCHINSON: Or they cut the money.

THE COURT: What?

MS. HUTCHINSON: Cut the money for the host country.

THE COURT: Well, I know, but that's not for us to deal with. But what I'm trying to point out is that there is endemic in this business, there is discrimination. I'm sure Saudi Arabia doesn't want a lot of Jews over there in the State Department, and I know for a fact that one of the countries in South America told a person whom I knew quite

well that they didn't want him to be an ambassador because he was a Puerto Rican, and they turned him down. That fellow happens now to be one of the most preeminent judges in the United States and maybe he'll be in the Supreme Court soon. But they flatly said they didn't want a Puerto Rican. And they had to abide by that concern. But that's not what we're dealing with. I assume that's not what we're dealing with.

MS. HUTCHINSON: No.

THE COURT: Am I right about what I just said?

MS. HUTCHINSON: Yes, there are instances of that. And that's a problem in this field . I agree with that.

THE COURT: Am I right?

MR. BIRCH: See you on the 22nd, Your Honor.

THE COURT: Anybody that wants to come then can come. It's not closed, but I just don't think we have to make any notice.

(Whereupon, the proceedings were concluded at 6:50 o'clock p.m.)

- - -

CERTIFICATE

I certify that he foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

BEVERLY J. BYRNE
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Docket No. CA 86-2850

WALTER THOMAS,

Plaintiff,

vs.

JAMES BAKER,

Defendant.

. . . . . .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE.

Filed: April 24, 1997

Proceedings reported by stenomask, transcript produced from dictation.

PROCEEDINGS

THE DEPUTY CLERK: Civil Action 86-2850, Walter Thomas, et al. versus Madelyn Albright. Counsel, please state your names and who you represent for the record.

MR. BIRCH: Your Honor, the question was what the possibility of a remand from the Court of Appeals was. And I don't have an answer on that. Let me tell you where we are in the process, though.

In part, there is some consideration right now going as to whether the Cook Eubanks decision, which is the genesis of this discussion, should be heard en banc, and there are discussions going on right now at the Department of Justice, which were a party to, as to whether that decision should go en banc. We have 45 days after the decision within which we have to make a decision on that which-

THE COURT: I thought you won? Why would you want it to go en banc?

MR. BIRCH: Well, we won on the particular individuals, but the position that it established bout being able to opt out of a (b)(2) class is something that is something that is very troubling to the government. And the problem is if we don't go en banc in this case, it becomes the law in the Circuit, and therefore it binds the subsequent panel, So therefore this may be the opportunity that we have

THE COURT: And so - -

MR. BIRCH: So the short answer is, if we go en banc in that case, it doesn't make sense to remand back to this Court for a proposition that may be overturned. So it seems to me that we first need to decide whether we're going to go en banc in the Cook Eubanks decision. If we don't, them it becomes an easier decision as to whether to remand or not.

If we do go en banc in the Cook Eubanks decision, it's not worthwhile for us to come back in front of you because the rules may change.

Now, again, it's a 45 day time period. The decision came down such that if we're going to file a petition for rehearing en banc, it would have to be filed by May 26. That's the 45th day. So the short answer is, Your Honor, we've got meetings at Justice set up. We've talked to the powers that be.

THE COURT: So your suggestion is to wait until after May 6?

MR. BIRCH: May 26.

THE COURT: Oh, May 26.

MR. BIRCH: That's the date – we can't move – we can't do that until we've decided whether we're going to go en banc, Your Honor.

THE COURT: If you're not going to go en banc, then you would bring back the case to me?

MR. BIRCH: I've asked –

THE COURT: To make findings within the --

MR. BIRCH: If we don't go en banc, then that's part of the discussion we're having with the Solicitor General's office. They would have to authorize us to file the Smith v. Pollin thing, and part of our – we're talking Cook Eubanks, and we're also talking Thomas, so that we'll have to decide that . The SG is the one that has to decide that.

THE COURT: Well, what do the other folks think?

MR. BIRCH: If I can say one other thing, Your Honor?

THE COURT: Oh, you can certainly may.

MR. BIRCH: We contacted -- we called counsel for Mr. Thomas and Mr. Laltimer yesterday to try and engage in a discussion with them about document discovery, because as you recall, Your Honor, you had asked us whether we were willing to work that out with them, and we haven't heard back, but we still continued to be willing to work out document discovery with counsel for --

THE COURT: So in other words, you would be hitting the road and running if it ever came back. Is that what you're saying?

MR. BIRCH: Yes, Your Honor.

Else- - all right? How are you this afternoon?

MR. HUTCHINGSON: Pretty good. I was in depositions all day. That's why he has not heard from me.

THE COURT: But isn't it a good idea to bring the young ladies?

MR. HUTCHINSON: Oh, I think it's wonderful. I wish I'd have had that kind of opportunity. I don't know. I might have changed my mind.

I think that where we stand in this case is that it's very unlikely that the Court of Appeals is going to hear this Eubanks case en banc, because there is nothing startling or in the decision that was issued by the panel, and even if they decided that they wanted to do it, they don't have to, because the very appeal that Mr. Birch filed actually addresses the very issue that Mr. Birch filed actually addresses the very issue that they're seeking to have heard en banc, and that was the issue that was directly appealed in this case.

But at any rate, I don't think we can get a remand, because under teat Smith v. Pollin case that Mr. Birch had mentioned at the last session, Smith v. Pollin only deals with newly discovered evidence. So even if he won the remand, he can't get it because there is no newly discovered evidence.

THE COURT: Well, wait, wait, wait a second. I think that the -- I think it's a discretionary matter, an d I think that nothing could be more newly discovered than a new decision that has come down which I've got to conform my decision to it.

MR. HUTCHINSON: No, the Court didn't -- in Smith v. Pollin, they didn't deal with it in that fashion. They said they can decide the case that's before them.

THE COURT: Well, but isn't it a discretionary matter?

MS. HUTCHINSON: No.

THE COURT: The Court of Appeals has no discretion to --

MS. HUTCHINSON: Oh, it is their discretion to send it up or down.

THE COURT: And so if the Department of Justice, U.S. Attorney's Office says, look, there's been a new case, and we've had some hearings before Judge Sporkin subsequent to his decision, and that it is our view, and they can speak for me, and Judge Sparkin's view that the case ought to come back so the judge can coordinate it with the decision in the – What is it, the Cook case?

MS. HUTCHINSON: But the problem is in this case that the only thing that the Court of Appeals said in the Eubanks case about opting out is that it was within the judge's discretion, and it wasn't their place to decide the motion . So even if you agreed to bring it back, they said we're not -- their job wasn't -- so I don't see how he's going to get a remand, because he has to get the remand, because it's his appeal that has to go back.

THE COURT: That's right.

MS. HUTCHINSON: I don't see how he can get it, because the Eubanks case said it was not their job to decide it. It was a discretionary matter, and even if they disagreed with the judge below, then, you know, so what? If that judge – it was within their discretion to make the decision opting in or out, so I don't know how he would get a remand in this case at all, even if they go en banc.

THE COURT: All right, Anybody else would like to be heard? Oh, I'm sorry. You wanted to be heard? Oh, I'm sorry. You wanted to be heard? Go ahead, Mr. Thomas.

MR. THOMAS: From the last time, your Honor, it's about the issue that has come up.

THE COURT: Well, let me see. I'll hear you. Stand up. Don't sit down. But let me see what are my choices now? The government wants me to issue a stay, right?

MR. BIRCH: Yes, Your Honor.

THE COURT: And, however, if I issue the stay, that you will go along – this is for the opting out people, that you exchange documents, right?

MR. BIRCH: For those two people, yes, we'll engage in discussions about document discovery.

THE COURT: And how about interrogatories? Could you go on that one, too?

MR. BIRCH: That I haven't talked with my client about. All I've talked with them is about document discovery.

THE COURT: I will--do you see any problem if I --

MR. BIRCH; If we can't work it--

THE COURT: The problem with me is when I talk to my client, it's me. So I can make may decision faster than you can make your decision, because you have to talk to a client that's somebody else.

MR. BIRCH: I'm with you, Your Honor. I understand. Anyway, Your Honor, the Court is aware that the Solicitor General has to be involved in this process. I think we can work something out with Ms. Hutchinson.

THE COURT: What I'm saying is we don't – I like your idea, but I do want to also try to get the case – if I've got to do something mere with it, that we get it moving.

MR. BIRCH: We can engage in some discussions, see where we can go on it, Your Honor, and see if we can work out something with Ms. Hutchinson.

THE COURT: Well, Ms. Hutchinson, would that be enough if we do the interrogatories and the document—in other words, that's the heavy lifting anyway.

MS. HUTCHINSON: Yes, that would be just fin. We could do that.

THE COURT: Because I don't know how many, you know depositions you're going to – all right. Well, I will condition my—I'm sorry. I didn't ask—

MS. WATSON: Excuse me, Your Honor. Theresa Watson representing the others who have opted out. Our persons did not oppose the motion because we did not receive the notice in time to do so. However, we do not want the stay to prohibit them from being able to file their lawsuits. There are three.

THE COURT: Three. You don't have any problems with that?

MR. BIRCH: Of course, I do, Your Honor. It's the whole reason we want the stay, to sit there and end up not in getting involved in a whole lot of litigation.

THE COURT: No, No, but all you would do – these are –how many are – we're talking five cases?

MS. WATSON: Three.

THE COURT: Three and two are five. All I'm asking you to do is two things. One, exchange the documents and two respond to a limited number of interrogatories.

MR. BIRCH: Judge, I didn't—

THE COURT: if there is any problem with it, if you think it's going to take—come on in for a protective order. You know I'm not going to –but the only thing is I want to get some movement here. That's all. Because these cases are how many years old now, 10, 12, 15?

MS. HUTCHINSON: Fifteen.

THE COURT: Somebody accused me yesterday of having the oldest case in the courthouse, and why do I take so long in deciding cases?

MR. BIRCH: Your Honor, this is a complete surprise to me. We filed a motion. Nobody opposes it, other than two other people. We had a hearing last week. We don't hear that anybody is opposing it, and now out of the blue—

MS. WATSON: Well, -

MR. BIRCH: Can I finish please?

MS. WATSON: Well, after you knocked me off of may space here last week, -

THE COURT: All right, folks, no, no, no. Look, civility. We got young kids in this courtroom. This is not Friday Night at the Fights.

MS. WATSON: No, we're not. We're not. I mean, I should fought last week.

THE COURT: Come on. You're all good lawyers. And the last thing that a judge has to be is a ringmaster.

MS. WATSON: That's right. And the fact that we did not oppose a motion to stay should not be a reason why we should not be able to file our cases as is allowed to the other two.

THE COURT: Well, the only thing is that the limited-I'm going to give what I call a stay with exception, the exception being that a reasonable amount-exchange of documents and a reasonable amount of interrogatories, with the proviso that if it becomes burdensome, I will be here, because I want to watch this case very closely, either party can come in for a protective order.

MR. BIRCH: Judge, I'll probably get in trouble with my client, but we'll try and see if we can work something out along that line.

THE COURT: All right. What else is there? Anything else? All right. Come on up. You should have been a lawyer.

MR. THOMAS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. THOMAS: Thank you. I have some second thoughts about that. Your Honor, the last time I was here you had asked that I save what I have to say, and so now I'm here to take up an issue, Your Honor, in connection with the motion that Ms. Hutchinson filed. And I'm not here so much to debate the legality or illegality. I'll let here address that, Your Honor, but I'm here on behalf of our legal action committee, and to speak about a document here which we had no idea existed, and in my opinion, and I'm open to error, this is illegal.

We've engaged some attorneys to represent us and protect us to the highest level possible. And we think that it is patently wrong to take an issue verbally and then as a second action to sign an agreement not to represent us and therefore really in essence extinguishes or just derogates our rights, not only the rights of the representatives, but of the class as a whole.

THE COURT: Tell me specifically what you have in mind.

MR. THOMAS: Well, if I could just mention one thing, it's not a side issue, because I consider it just as important, but I'm talking about the side agreement. Your Honor, that was signed—

THE COURT: By Sellers?

MR. THOMAS: Yes. I'll get to it.

THE COURT: The letter to Birch?

MR. THOMAS: yes, the side letter.

THE COURT: Is this the side letter? It doesn't say side letter so I don't know.

MR. THOMAS: Well, they've called it a side letter, Your Honor.

THE COURT: All right. And it's the letter of March 19, 1996?

MR. THOMAS: That's right, Your Honor.

THE COURT: And you say there is something wrong with that letter?

MR. THOMAS: Well, there is something wrong with it, because first of all,-

THE COURT: Let me just read it, and then I'll see what the problem is.

(Pause)

THE COURT: Isn't this something that was put before me at one time, and didn't I add something to it, as I recall?

MR. THOMAS: Your Honor, I'll let Ms. Hutchinson address that issue because I believe it goes into what she has said in her motion. However, from the standpoint of the lawyers representing us and signing that kind of an agreement. I'd like to say that Mr. Carl Anderson. Your Honor, had been dismissed from this case approximately six weeks before he came here to Washington and signed that agreement saying that he wouldn't represent us.

And his retainer agreement here, that I have here, Your Honor, it clearly states that at any time that I could dismiss him in writing and that's what I did. And I sent the letter to him in February, Your Honor.

THE COURT: Let me point out something to you. Now, what we're doing here, and I'm not quarreling with the substance, because I haven't examined the substance. It seems to me that the proper way to proceed here would be that you could question the actions of your lawyer, but I don't think – I'm the forum before whom you're to question these.

You know, I found the settlement to be fair from all parties, which is my duty and responsibility. You're claiming get involved at all in the opting out.

MR. THOMAS: That would be this document that you just read, Your Honor, the March 19-

THE COURT: I can't say—look, some people ask me are you able to say I saw a document, and if you would know the thousands of documents I see each year, it's impossible for me to state-

MR. THOMAS: Oh, I understand, Your Honor.

THE COURT: What was put before me, folks?

MR. THOMAS: Let me defer to Ms. Hutchinson so that she can speak about the motion, and then I will just have—

MS. HUTCHINSON: Forget about my motion today. This document was not put before the Court. The signed agreement was not.

MR. THOMAS: Was not, Your Honor.

THE COURT: What's that?

MR. THOMAS: Was not put before the Court.

THE COURT: Is that right? What am I –what is it that I was told?

MR. CONNELLY: Your Honor, it is correct that the document itself was not shown to you. It is also correct that the you were informed about the agreement at the

preliminary hearing and at the final hearing, and even at a hearing this past fall on September 19, when Mr. Birch specifically that there is a problem between you and the lawyers that engaged-the class action lawyers. I think we're beyond that point. And it seems to me that if you got a complaint there are plenty of places to bring it. I don't think this is one of them. Now, I might be wrong, but do you people see that the way I see it.

MR. THOMAS: Your Honor, this is – I do understand what you're saying, and that has been set in motion to make that an action which we 15 of us have taken to do. What I wanted to point out was and is to the Court that, in fact, I didn't know anything about it, and you seemed to think that –

THE COURT: Well. You-then you would know what I know, because you've been here every time I've been here right?

MR. THOMAS: Right. That's right, Your Honor.

THE COURT: Except one time you missed.

MR. THOMAS: That's right. Just the one time that I missed. This is just to make an observation to the Court that this attorney came here to Washington and was not a part of this case and signed this agreement. Now, at the time obviously you didn't know it, and neither did we, that, in fact, this agreement existed.

THE COURT: Somehow I got a recollection that I was told or I saw this paper about this-about this arrangement that they were not going to appeal. They were not going to get involved at all in the opting out.

MR. THOMAS: That would be this document that you just read, Your Honor, the March 19-

THE COURT: I can't say-look, some people ask me are you able to say I saw a document, and if you would know the thousands of documents I see each year, it's impossible for me to state-

MR. THOMAS: Oh, I understand, Your Honor.

THE COURT: What was put before me, folks?

MR. THOMAS: Let me defer to Ms. Hutchinson so that she can then speak about the motion, and then I will just have-

MS. HUCHINSON: Forget about my motion today. This document was not put before the Court. The signed agreement was not.

MR. THOMAS: Was not, Your Honor.

THE COURT: What's that?

MR. THOAMS: Was not put before the Court.

THE COURT: Is that right? What am I –what is it that I was told?

MR. CONNELLY: Your Honor, it is correct that the document itself was not shown to you. It is also correct that you were informed about the agreement at the preliminary hearing and at the final hearing, and even at a hearing this past fall on September 19, when Mr. Birch specifically mentioned the side letter.

THE COURT: By the way, was your firm appointed by the Court in this Case?

MR. CONNELLY: No, we were not, Your Honor.

THE COURT: Because there is somebody who is going to get booted if I don't take his case. He's got his client in a spot that the parking meter is expiring.

MR. THOMAS: Then let me just briefly say then just as a statement for the record from me and the legal action committee. Your Honor, saying that a lawyer takes a position and that's the lawyer's position, having a retainer agreement with a group of people, that's one thing. But to sign an agreement with the defendant is quite another, and if that's the issue that we're talking about, and especially when one of the lawyers who signed it knew that he had been dismissed from the case six weeks prior and Akin Gump knew because I supplied them a letter to that effect.

So they, in fact, came. He signed the agreement. They signed it and said it was their position—they never told us that there was a signed agreement. That's my only point, and we want that –we will take it up with the proper tribunal.

THE COURT: I don't think I'm the right forum. Is that the way you see it, Mr. Birch?

MR. BIRCH: Can I say one thing, Your Honor.

THE COURT: You're not a party to-

MR. BIRCH: Ms. Hutchinson filed a motion to add the letter to the record. Akin Gump hasn't opposed it. Lawyer's Committee hasn't opposed it. The government hasn't opposed it. You have a motion in front of you that nobody has opposed, so you can sign it. That's the only issue that's been filed in the motion, so-

THE COURT: All right. Ms. Hutchinson, would that satisfy you, make it a part-

MS. HUTCHINSON: That satisfies me, Your Honor. That was all I had.

THE COURT: Now, how about Mr. Thomas? Does that satisfy you?

MR. THOMAS: Yes, Your Honor, because you've said that this is not the forum to bring whatever complaint. So I agree.

THE COURT: I could be wrong, but that's the way I see it.

MR. THOMAS: No, no, and I can see why it's not, because it's not an issue that has to come before you, but it will come somewhere, Your Honor. I assure you that. So I agree. As long as the lawyers for me are satisfied, I will let the issue rotate and come up where it should be brought.

THE COURT: I will issue an order that will allow it-will say let this be filed and put in the record. Okay?

MR. THOMAS: Okay, Your Honor, and 15 of us have started some proceedings that do exactly what you say, bring it in another forum. Thank you.

THE COURT: All right. Am I finished then with you folks?

MR. BIRCH: Yes, Your Honor.

THE COURT: So I'm going to make a conditional-if you people want to, you know, attempt to draft something, I'd be happy to get any input you have.

MR. BIRCH: I'll be glad to consult with Ms. Hutchinson.

THE COURT: When would you have it in?

MR. BIRCH: We'd try to get it in on Monday.

THE COURT: That would be fine. All right. Monday would be all right?

MS. HUTCHINSON: Monday would be fine.

THE COURT: All right. Call the next matter. (Whereupon, the proceedings were concluded at 3:07 o'clock p.m.)

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART VI - PARTICULAR PROCEEDINGS

CHAPTER 155 - INJUNCTIONS; THREE-JUDGE COURTS

Sec. 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Supreme Court, U.S.
FILED
AUG 30 2001
OFFICE OF THE CLERK

No. 01-189

IN THE SUPREME COURT OF THE UNITED STATES

WALTER J. THOMAS, et al.,

Petitioners,

v.

COLIN L. POWELL,
Secretary of the Department of State, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

MARC L. FLEISCHAKER
Counsel of Record
HENRY MORRIS, JR.
AREN'T FOX KINTNER PLOTKIN & KAHN, PLLC
1050 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20036-5339
(202) 857-6000

Counsel for Respondents Joseph M. Sellers and Avis E. Buchanan

HENRY F. SCHUELKE, III
S. ROBERT SUTTON
JANIS, SCHUELKE & WECHSLER
1728 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20036
(202) 861-0600

Counsel for Respondents Akin, Gump, Strauss, Hauer & Feld, L.L.P., Warren E. Connelly, Charles L. Warren, and Michael J. Madigan

19 pp

QUESTION PRESENTED

Whether the courts below violated the Anti-Injunction Act, 28 U.S.C. § 2283, in enjoining a state court action that sought to relitigate issues previously decided in a federal action?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

A. The Underlying Class Action 2

B. The Superior Court Action 4

C. The District Court's Permanent Injunction 6

D. The Court of Appeals' Affirmance 7

REASONS FOR DENYING THE WRIT 9

A. The Decisions Below Are Fully Consistent with the Anti-Injunction Act 9

B. The Decisions Below Involve No "Expansion" of the Relitigation Exception to the Anti-Injunction Act 13

C. This Case was Correctly Decided and Does Not Involve Issues of Interest to Anyone Other than the Parties 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 9, 10, 11

Golden v. Pacific Maritime Ass'n, 786 F.2d 1425 (9th Cir. 1986) 12

Laskey v. International Union, (UAW), 638 F.2d 954 (6th Cir. 1981) 12

Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) 12

Other Authorities

Anti-Injunction Act, 28 U.S.C. § 2283 ..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 247 F.3d 260 (D.C. Cir. 2001) and is reprinted at pages 1-18 of the Appendix to the Petition ("Pet. App."). The opinion of the United States District Court for the District of Columbia is reported at 77 F. Supp. 2d 114 (D.D.C. 1999) and is reprinted at Pet. App. 19-42.

STATEMENT OF THE CASE

A. The Underlying Class Action

In 1986, Petitioner Thomas and another plaintiff sued their employer, the United States Department of State, in the United States District Court for the District of Columbia. Pet. App. 4-5. The plaintiffs alleged discrimination against African American Foreign Service Officers, and sought certification as a class action. Pet. App. 4-5.

Petitioners were both named and intervenor plaintiffs in that suit. Respondents served as counsel for the putative class and later for the class as certified.

On January 31, 1996, after years of discovery and lengthy settlement negotiations, counsel for the parties signed a proposed consent decree setting forth the terms of a negotiated settlement. Pet. App. 72-74. The proposed consent decree required the State Department to reform its employment practices, enjoined the agency from discriminating against African American Foreign Service Officers, and provided for significant class-wide retroactive relief. Pet. App. 77-83. The parties also agreed that the District Court would certify the class under Federal Rule of Civil Procedure 23(b)(2). Pet. App. 5.

During a January 31, 1996, status conference, Petitioner Thomas, who was then represented by separate counsel, complained at length that several of the named class action plaintiffs opposed the settlement and had not been informed of its terms. Pet. App. 5. The District Court concluded the status call by scheduling a preliminary fairness hearing for March 20, 1996. Pet. App. 74.

Each Petitioner was represented by separate counsel at the preliminary fairness hearing, and their counsel fully presented the Petitioners' objections and concerns. The District Court nevertheless preliminarily approved the settlement and scheduled a fairness hearing designed to satisfy the requirements of Federal Rule of Civil Procedure 23(e) to begin on July 15, 1996. Pet. App. 27-28. The District Court further directed that all putative class members be informed of their right to file comments regarding the proposed consent decree, and to appear at the Rule 23(e) fairness hearing. Pet. App. 27.

During the Rule 23(e) fairness hearing, which began on July 15, 1996, and continued on July 22 and 23, 1996, Petitioners were again represented by separate counsel, and the District Court heard from every class member and legal representative who requested an opportunity to speak. Pet. App. 27. Several individual class members, including Petitioners, alleged during the preliminary and Rule 23(e) fairness hearings that Respondents had entered into the proposed settlement after most of the named and intervenor plaintiffs had rejected it (*see, e.g.*, Pet. App. 162, 169, 240), that they had failed to follow the named and intervenor plaintiffs' instructions regarding the negotiations (*see, e.g.*, Pet. App. 329), and that they had failed to keep the named and intervenor plaintiffs fully informed about the settlement negotiations (*see, e.g.*, Pet. App. 169, 260).

After "carefully consider[ing] . . . [e]ach of the issues raised by the objectors," the District Court found "the Consent Decree as a whole [to be] fair, reasonable, and adequate to the class." Pet. App. 103. The Court also found that the "settlement was clearly negotiated at arm's length and presents no danger of collusion" between the parties, and that Respondents had represented the class fairly and adequately. Pet. App. 93, 107. The District Court certified the class under

Rule 23(b)(2), but amended the settlement to permit individual class members to opt out. Pet. App. 104.

Both the State Department and a group of dissatisfied plaintiffs, including each of the Petitioners, appealed. Pet. App. 45. On appeal, the United States Court of Appeals for the District of Columbia Circuit agreed that the settlement was "eminently fair and reasonable to the class as a whole," and that Respondents had "more than adequately represented the class as a whole." Pet. App. 50, 55. Moreover, the Court of Appeals explicitly rejected Petitioners' claim that Respondents had acted in their own self interests by entering into a side letter agreement which provided that they would not advocate the right to opt out of the settlement agreement. Pet. App. 55.

The Court of Appeals did not agree, however, with the District Court's decision to allow class members to opt out. Pet. App. 63-64. The Court of Appeals carefully examined the District Court's decision and found that the District Court "did not make findings sufficient to support the conclusion that a hybrid class certification was appropriate." Pet. App. 61. To the contrary, the District Court had made all the findings "necessary to show that a hybrid class was *not* appropriate." Pet. App. 61 (emphasis added). Accordingly, the Court of Appeals held that the class was properly certified under Rule 23(b)(2), without opt out rights. Pet. App. 64.

This Court denied the dissident plaintiffs' petition for a writ of certiorari. 525 U.S. 1033 (1998).

B. The Superior Court Action

Petitioners, unsatisfied with the resolution of the class action, decided to "seek from class counsel the monetary relief that counsel could not obtain in its negotiations with the State

Department," Pet. App. 38, by suing Respondents for professional negligence in the Superior Court of the District of Columbia. In their Superior Court complaint, Petitioners alleged:

> 1. The class action attorneys breached a duty of undivided loyalty to Thomas by "'selling out' and betraying [the Plaintiffs] . . . when they entered into [a] secret agreement" to settle the case without seeking Thomas's approval first. *See* Complaint for Professional Negligence ¶ 28, *Thomas v. Akin, Gump, Strauss, Hauer & Feld, L.L.[P., et al.]*, No. 99ca1898 (D.C. Super. Ct. filed Mar. 19, 1999); *see also id.* ¶¶ 37, 46, 55, 64 (making same allegations for Thomas's co-plaintiffs).
>
> 2. The class action attorneys failed to disclose the alleged conflict of interest created by acting as class counsel and failed to inform Thomas of the negotiating position they would take with the State Department. *See id.* ¶ 29; *see also id.* ¶¶ 38, 47, 56, 65 (making same allegations for Thomas's co-plaintiffs).
>
> 3. The class action attorneys failed to follow Thomas's "express instructions regarding the certification of the class action as a Rule 23(b)(3), which would have provided for him to 'opt-out' of the class in order to receive his full measure of damages . . . ." *Id.* ¶ 26; *see also id.* ¶¶ 35, 44, 53, 62 (making same allegations for Thomas's co-plaintiffs).

Pet. App. 8.

C. The District Court's Permanent Injunction

In response to Petitioners' Superior Court action, Respondents filed in the District Court an Application for Injunctive Relief, seeking an order enjoining prosecution of the action in the Superior Court. Pet. App. 6. Respondents argued that the Superior Court action was nothing more than an attempt to relitigate matters relating to the adequacy of Respondents' representation in the underlying class action, which had already been adjudicated by both the District Court and the Court of Appeals. Pet. App. 31, 33. Respondents argued that Petitioners were collaterally estopped from seeking to relitigate these issues and that prosecution of the Superior Court action should thus be enjoined. Pet. App. 31, 33.

On December 7, 1999, the District Court granted Respondents' Application, holding as follows:

> The Court finds that the adequacy of the representation provided by [Respondents] *was actually litigated in this matter*. The Court entered a valid, final judgment on the merits after a full and fair opportunity for [Petitioners] to address the merits of [Respondents'] representation. In fact, [Petitioners] did make their objections known to the Court, and by their individual attorneys argued that the settlement did not fully address their individual rights. . . .
>
> The Court's finding that the settlement was fair, and that [Respondents] did in fact adequately represent the class was essential to its judgment. Rule 23(e) required the Court's finding of fairness as a condition to approval of the settlement. Thus, what is clear is that the settlement and consent decree rest on the

> essential finding that [Respondents] adequately represented [Petitioners].
>
> [Petitioners], through the Superior Court action, now seek from [Respondents] the monetary relief that counsel could not obtain in its negotiations with the State Department. While [Petitioners] claim not to be attacking the settlement or consent decree, or the adequacy of [Respondents'] representation in negotiations with the State Department, *it is impossible to read that action as anything but a collateral attack on the findings of this Court (and the Court of Appeals)* that [Respondents] fairly and adequately carried out its duties to the members of the class.

Pet. App. 37-38 (emphasis ~~added).~~ The District Court granted a permanent injunction after concluding that allowing the Superior Court case to go forward would have severe consequences, including discouraging future class counsel from attempting to settle class actions, discouraging attorneys from bringing class actions, and creating the possibility of nullifying the decisions of the District Court and the Court of Appeals as to the adequacy of representation. Pet. App. 39-41.

D. The Court of Appeals' Affirmance

Petitioners appealed. They argued that the Anti-Injunction Act barred the injunction issued by the District Court and that the relitigation exception to the Act, on which the District Court had relied, did not apply. Pet. App. 6.

Like the District Court, the Court of Appeals carefully analyzed Petitioners' Superior Court complaint and found that the complaint articulated the three claims described above. Pet.

App. 8. The Court then carefully considered those claims to determine whether they involved issues that had already been decided. As to the first two claims, the Court held that:

> there can be no doubt that the district court's injunction falls within the [relitigation] exception to the Anti-Injunction Act. Before approving the class action settlement, the district court performed its duty of determining whether the "settlement is fair, adequate, and reasonable and is not the product of collusion between the parties." The court found that the "settlement was clearly negotiated at arm's length and presents no danger of collusion" between the parties. The court further found that [Respondents] "fairly and adequately protected the interests of the class." While the Superior Court complaint alleges that [Respondents] "sold out" their clients, that they engaged in collusive secret negotiations to the detriment of their clients, the district court squarely decided otherwise. [Petitioners] may not relitigate these matters and an injunction preventing them from doing so in the Superior Court was in order.

Pet. App. 9 (internal citations omitted).

As to the remaining claim, a majority of the Court of Appeals concluded that, "[t]he third claim . . . rests partly on the retainer agreement between [Petitioner] Thomas and [Respondents], an agreement Thomas says imposed additional duties on [Respondents]," and is "part of a larger argument about whether [Respondents] committed professional negligence." Pet. App. 9-10. The majority found that, in order for Petitioners to succeed on their third claim, they would have to "demonstrate duty, breach, causation, and harm" – the necessary predicates to a legal malpractice claim under District

of Columbia law. Pet. App. 10. Then, focusing on the issue of harm, the majority concluded that Petitioners could establish harm only if they could establish that "they were damaged because the class *should* have been certified under Rule 23(b)(3) . . . [b]ut that necessarily would entail relitigating an issue already decided in the federal courts." Pet. App. 10-11 (emphasis in original).[1/] Accordingly, the Court of Appeals held that "the relitigation exception to the [Anti-Injunction] Act permitted the district court to enjoin [Petitioners] from pursuing their compliant in the Superior Court." Pet. App. 13.

REASONS FOR DENYING THE WRIT

A. The Decisions Below Are Fully Consistent with the Anti-Injunction Act

The decisions below represent a straightforward and conventional application of the relitigation exception to the Anti-Injunction Act, on its face and as construed by this Court in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). As such, they raise no important federal question warranting the Court's attention.

The Anti-Injunction Act generally bars federal courts from granting injunctions to stay state court proceedings. 28 U.S.C. § 2283. The Act, however, includes within its terms an explicit exception to this general prohibition, where an injunction is "necessary . . . to protect or effectuate [the federal court's]

[1/] Judge Sentelle agreed that Petitioners' first two claims had been adjudicated in the underlying class action, but dissented from the majority's holding that an injunction was properly issued with respect to the Petitioners' third claim. Pet. App. 18.

judgments." *Id.* This exception, known as the relitigation exception, is intended to ensure the effectiveness and supremacy of federal law by preventing state litigation of an issue that was presented to and decided by the federal court. It is founded on well-established concepts of issue and claim preclusion. *Chick Kam Choo*, 486 U.S. at 147.[2/]

In *Chick Kam Choo,* this Court instructed that the federal courts are not to engage in a "post-hoc judgment" of what an earlier federal order "was *intended* to say" when determining whether to invoke the exception. *Id.* at 148 (emphasis in original). Rather, the federal court must "assess[ ] the precise state of the record and what the earlier federal order *actually* said." *Id.* (emphasis in original).

The lower courts in this case fully complied with this Court's dictates in *Chick Kam Choo*. After carefully reviewing Petitioners' malpractice complaint and the record in the underlying class action, the District Court found that Petitioners, whose interests were fully represented at the fairness hearings by the separate counsel specifically retained for that purpose, had been provided with a full and fair opportunity to challenge the adequacy of Respondents' representation. The District Court further found that Petitioners

---

[2/] The Court of Appeals "assume[d], without deciding" that the District of Columbia is a "state" for purposes of the Anti-Injunction Act, and found that the injunction at issue fell within the relitigation exception to the Act. Pet. App. 4. However, because the relitigation exception is based, in relevant part, on the doctrine of issue preclusion, *see, e.g.*, *Chick Kam Choo*, 486 U.S. at 147, that doctrine would have required the same result in this case even if the Act and its exceptions were not applicable.

had, in fact, raised objections during the earlier litigation that paralleled the claims set forth in their Superior Court Complaint. *See* Pet. App. 27, 38, 39. Accordingly, the Court determined that "the action in Superior Court" was an "attempt[] to relitigate issues that have already been finally and fully litigated" in the federal courts. Pet. App. 39.

The Court of Appeals similarly undertook a reasoned analysis of Petitioner's malpractice claims and a majority of the Court found that each of the claims would entail relitigation of issues previously decided in the federal courts.[3/] As directed by *Chick Kam Choo*, the Court of Appeals based its opinion on "the precise state of the record." 486 U.S. at 148. *See* Pet. App. 7 ("[W]e must therefore compare the complaint in the Superior Court to the record in the class action . . . "). Having done so, a majority of the Court held that all of Petitioners' claims had been actually litigated in the underlying class action.[4/] Issuance of an injunction was, accordingly, necessary

---

[3/] Although Judge Sentelle dissented from the majority's holding that Petitioners' third claim was properly enjoined, he did so *not* because he believed the majority was improperly interpreting the relitigation exception, but because he disagreed with the majority about whether the class certification issue central to Petitioners' third claim had been *actually decided* in the underlying class action. *See* Pet. App. 18. Thus, even if he is right and the majority wrong, this case does not present an issue that merits the Court's attention.

[4/] Judge Sentelle's position that the class certification issue had not been actually decided in the underlying class action is directly contrary to the majority's finding that Petitioners, who were each represented by separate counsel during the fairness hearings, and who supported the creation of

to protect or effectuate the prior judgments of the federal courts, *i.e.*, it was permissible under the relitigation exception to the Anti-Injunction Act.

Moreover, the courts below are not the first to apply the relitigation exception in circumstances similar to those presented here. As the District Court noted, several other Courts of Appeals have applied the exception to similar facts. *See Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425 (9th Cir. 1986); *Laskey v. International Union, (UAW)*, 638 F.2d 954 (6th Cir. 1981); *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). The Petitioners have not pointed to any court decision reaching a contrary result on similar facts. The decisions below are, in short, wholly unremarkable.

Because the decisions below are fully consistent with the provisions of the Anti-Injunction Act, on its face and as construed by this Court and the other Courts of Appeals, they involve no important federal question warranting the Court's review. The Petition should, therefore, be denied.

---

a hybrid class, had failed to provide any support for a determination that a hybrid class was appropriate. Pet. App. 11. "Our conclusion in *Thomas* that there was no basis for certifying a hybrid class necessarily meant that there was no basis for certifying a class under Rule 23(b)(3)." Pet. App. 11, n.2.

B. The Decisions Below Involve No "Expansion" of the Relitigation Exception to the Anti-Injunction Act

In an effort to persuade this Court to grant review of the decisions below, Petitioners contend that those decisions involve an "expansion" of the Anti-Injunction Act's relitigation exception. The record, however, belies any such contention.

As noted above, the courts below properly examined the claims set forth in the Superior Court malpractice complaint against the backdrop of the issues actually decided in the underlying class action. The injunction was issued, and later affirmed, on the basis of the courts' well-reasoned conclusions that Petitioners could not possibly succeed on any of their claims unless matters previously decided in the federal courts were "relitigated and found to be incorrect." Pet. App. 11. The lower courts' reasoned application of the relitigation exception to the Anti-Injunction Act in no way represents an "expansion" of the scope of that exception.

Petitioners suggest that because the focus of the fairness hearings was on the adequacy of the representation provided by Respondents to the class as a whole, they cannot be collaterally estopped, absent an "expansion" of the relitigation exception, from asserting malpractice claims based on the adequacy of the representation provided to them. As the courts below recognized, however, when they examined the "precise state of the record" to determine whether Petitioners' claims had previously been litigated, the adequacy of the legal representation provided by Respondents to Petitioners was fully litigated both during the fairness hearings in the District Court and in their appeal to the Court of Appeals from the District Court's approval of the class action settlement.

Contrary to Petitioners' contentions, moreover, the Court of Appeals did not "expand[] the relitigation exception to enable an injunction to bar state court resolution of issues never addressed in the prior federal action merely on the basis that the plaintiffs are *not likely to succeed* in the state court." Petition at 10 (emphasis added). Instead, the Court of Appeals examined Petitioners' state court complaint to determine whether Petitioners *could possibly succeed* with any of their state court claims absent relitigation of issues previously decided in the federal courts. After concluding that they could not, the Court properly held that the injunction issued by the District Court was not barred by the Anti-Injunction Act.

C. This Case was Correctly Decided and Does Not Involve Issues of Interest to Anyone Other than the Parties

The courts below methodically applied well-established Anti-Injunction Act standards to the unique factual and procedural record in this case and correctly concluded that Petitioners were attempting to relitigate issues that the federal courts had considered and actually decided years ago. Because the lower courts' application of the statute was entirely conventional and straightforward, this case has significance for no one other than the parties. Accordingly, it presents no important federal question warranting the Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARC L. FLEISCHAKER
Counsel of Record
HENRY MORRIS, JR.
ARENT FOX KINTNER PLOTKIN
& KAHN, PLLC
1050 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20036-5339
(202) 857-6000

Counsel for Respondents
Joseph M. Sellers and
Avis E. Buchanan

HENRY F. SCHUELKE, III
S. ROBERT SUTTON
JANIS, SCHUELKE & WECHSLER
1728 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20036
(202) 861-0600

Counsel for Respondents
Akin, Gump, Strauss, Hauer &
Feld, L.L.P.,
Warren E. Connelly,
Charles L. Warren, and
Michael J. Madigan

Dated: August 30, 2001